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Submitted under Rule

Dec 7th 63.

Mr Justice Clifford

Statement of Facts

SUPREME COURT OF THE UNITED STATES.

No. ~~293.~~ 160.

DAVID GORDON AND SUSAN E. GORDON, ADMINISTRATORS OF GEORGE FISHER, DECEASED, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Claims Court

GOVERNMENT PRINTING OFFICE.

Claims appeal

postponed

Simpson 167 U.S. 781 13 Wall

2 Dallas.

Jury trial

201

SUPREME COURT OF THE UNITED STATES.

No. 293.

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1 At a Court of Claims held at the Capitol, in the city of Washington, on Monday, the 26th day of October, A. D. 1863—

Present: Joseph Casey, chief justice; Edward G. Loring, James Hughes, David Wilmot, Ebenezer Peck, judges—

The following case was disposed of:

2 DAVID GORDON and SUSAN E. GORDON *vs.* THE UNITED STATES. } No. 1885. Filed May 6, 1863.

Petition.

To the honorable judges of the Court of Claims of the United States of America:

Your petitioners respectfully represent and state to this court, that George Fisher, deceased, formerly a citizen of the United States, had a large amount of property taken or destroyed by the United States troops in 1813, for which afterwards a claim was made before Congress, and proof was duly made of the taking or destruction of said property and its value; and after due consideration, and many years' delay, the claim was allowed by Congress, and authorized to be paid. And Congress has passed the following acts and resolutions in relation to said claim, that is to say:

On the 12th of April, 1848, Congress passed an act directing the Second Auditor of the Treasury to examine and adjust the claim of the legal representatives of George Fisher, deceased, "upon principles of justice and equity, and having due regard to the proof of the value of the property taken or destroyed by the troops of the United States in suppressing Indian hostilities in 1813, so as to afford a fair and full indemnity for all losses occasioned by said troops, and to allow the claimants accordingly," and also directing "the same to be paid to the claimants out of any money in the treasury not otherwise appropriated."

In proceeding to make such examination and adjustment the Auditor rejected certain depositions as not properly authenticated.

On the 22d December, 1854, Congress passed an act requiring the Auditor in making such adjustment to give the claimants the benefit of the rejected evidence if then properly authenticated, and to proceed and make the adjustment in strict conformity with the former act.

On the 3d June, 1858, Congress passed a joint resolution directing that the duties to be performed under the two acts mentioned should be performed by the Secretary of War, who was required to proceed *de novo* to execute the same according to their plain and ob-

3 vious meaning: "Provided, nevertheless, That from the amount

that may be found justly and equitably due to the legal representatives of George Fisher, deceased, there shall be deducted all sums that may have been heretofore allowed and paid by the United States."

On the 2d October, 1858, the Secretary of War made a partial statement of this claim and account, (some depositions being still rejected.)

On the 1st June, 1860, Congress passed another joint resolution, requiring the Secretary of War to revise his examination of said claim under the acts and resolution aforesaid, "and on said revision to consider and give effect to all the testimony filed in said case, including certain depositions formerly rejected by the Second Auditor of the Treasury for want of authentication, but now duly authenticated, and to restate and resettle the account heretofore stated, and settled by him under said resolution, and to make such corrections in his said former statement and settlement, and such further allowances, if any, on account of said claims, beyond what has heretofore been allowed and paid, as in his opinion justice to the claimants may require."

As required by these acts and resolutions, the Secretary of War proceeded to make a full statement of this claim, and of each item as allowed by him, and to deduct therefrom all payments that had been allowed and paid, and decided and awarded the balance due to the claimants to be $66,519 85. His report and award were officially filed on the 23d Nov., 1860.

On the 28th Nov., 1860, the Auditor wrote to the administrator of George Fisher, deceased, notifying him of the award, stating its amount, &c., and requiring him to file proof of his authority to receive the money and give a receipt therefor.

On the 2d March, 1861, Congress passed a joint resolution declaring that the resolution of June 1, 1860, "be, and the same is hereby, rescinded, and the same and all proceedings under it are hereby made null and void."

A copy of each of said acts and resolutions are annexed to this petition as a part thereof, marked A, B, C, D, and E, in the order in which they passed.

Your petitioners further state that under and as required by the said resolutions of June 1, 1860, the Secretary of War took upon himself the burden of revising his examination of said claim, and proceeded to restate and resettle the account theretofore stated and settled by him, and to make such corrections in his former state-
4 ment and settlement, and such further allowances on account of said claim, beyond what had been theretofore allowed and paid, as in his opinion justice to the claimants required.

Your petitioners further state that in making such revision and in resettling said claim the said Secretary of War complied with the requirements of said resolutions of June 1, 1860, in all respects, and made his decision, or award, and allowance of said claim in strict conformity therewith, and with the other acts and resolutions relating to said claim, and that said decision, award, and allowance was

made upon said claim by said Secretary of War in strict conformity with said authority, given to him for that purpose, after a full and fair hearing of the parties, and after a careful examination of the case, and upon the legal and proper evidence upon which he was authorized and directed by Congress to decide, and, as advised, your petitioners claim that said award and allowance were and are final and conclusive.

A copy of said award is annexed as a part of this petition, marked (F,) and also a copy of the account as restated and resettled by said Secretary, marked (G.)

Your petitioners further state that said award and allowance was made by said Secretary after deducting all that had been paid by the United States upon said claim, and that said allowance and award remains due and owing and wholly unpaid. Your petitioners claim payment thereof, with interest thereon from the said 23d November, 1860.

Your petitioners further state that the amount awarded and allowed upon said claim by the said Secretary of War, on the said 23d Nov., 1860, was then justly and equitably due thereon, after allowing all just credits and offsets.

Your petitioners further state that, as advised, they claim and insist that the said repeal of the said resolution of June 1, 1860, after the authority of the Secretary of War had been fully executed, and the award made, was and is inoperative, unauthorized, and void, and could not prejudice or affect the vested right of those interested in said award, or recall what had been done under a valid and existing law.

Your petitioners further state that no assignment or transfer of said claim, or of any part thereof, or of any interest therein, has been made, except as hereinafter stated, and that these petitioners with the other legal representatives of said George Fisher, deceased, hereafter named, are justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets, and your petitioners believe the facts stated therein are true. The said
5 George Fisher, deceased, and all claiming under him in regard to this claim, including your petitioners and the other claimants, have at all times borne true allegiance to the government of the United States, and have not in anyway voluntarily aided, abetted, or given encouragement to rebellion against said government.

Your petitioners further state that they are entitled to two-thirds of said claim, one-third by a transfer to them from the legal representatives of said George Fisher, deceased, and one-third in the right of the said Susan E. Gordon, who was, before her marriage with said David Gordon, the widow of said George Fisher, deceased. And the other one-third part of said claim belongs to John Fisher, Alfred Fisher, and Mrs. Hayden, two sons and daughter of George Fisher, deceased, and to their heirs-at-law. There may be also children of

James Lyons and Jack F. Ross, sons-in-law of the said George Fisher, deceased, but if any of the said heirs are now living your petitioners are not aware of it.

And your petitioners pray for such relief as may be proper.

DAVID GORDON,
SUSAN E. GORDON,
Of Baltimore.

HENRY BENNETT,
Att'y and Counsel for Claimants, New Berlin, N. Y.

STATE OF MARYLAND, *City of Baltimore, ss:*

Before me, Bolivar D. Danels, a commissioner of the Court of Claims, personally appeared David Gordon and Susan E. Gordon, who, being duly sworn, depose and say that no assignment or transfer of the claim mentioned in the foregoing petition, or of any part thereof, or of any interest therein, has been made, except as in said petition stated; that the said claimants are justly entitled to the amount therein claimed from the United States, after allowing all just payments, credits, and offsets, and that they believe the facts as stated in said petition are true.

In testimony whereof, I hereunto set my hand and affix [L. S.] my official seal, this second day of May, in the year of our Lord eighteen hundred and sixty-three.

BOLIVAR D. DANELS,
[STAMP.] *A Commissioner of the Court of Claims.*

6 — A

AN ACT for the relief of the legal representatives of George Fisher, deceased.

Be it enacted, &c., That the Second Auditor of the Treasury of the United States be, and he is hereby, authorized and required to examine and adjust the claims of the legal representatives of George Fisher, deceased, on principles of equity and justice, and having due regard to the proofs for the value of property taken or destroyed by the troops of the United States engaged in suppressing Indian hostilities in the year 1813, and that the said legal representatives be paid for the same out of any money in the treasury not otherwise appropriated.

SEC. 2. *And be it further enacted*, That if it shall be found impracticable for the claimants to furnish distinct proof as to the specific quantity of property taken or destroyed by the troops, and by the Indians respectively, it shall be lawful for the said accounting officer to apportion the losses caused by said troops and Indians, respectively, in such manner as, from the proofs, he may think just and equitable, so as to afford a fair and full indemnity for all losses and injuries occasioned by said troops, and allow the claimants accordingly: Provided, That nothing herein contained shall authorize any payment for property destroyed by Indians.

Approved April 12, 1848.

[See Statutes at Large, page 712, vol. 9.]

B

AN ACT supplemented to an act therein mentioned.

Be it enacted, &c., That it shall be the duty of the Second Auditor of the Treasury, under the provisions of the act of Congress for the relief of the legal representatives of George Fisher, deceased, approved April 12, 1848, to re-examine the said case, and to allow the claimants the benefit of the testimony heretofore marked "rejected for the want of authentication:" Provided, The same is now legally authenticated by the executive of Alabama; the adjustment to be made in strict accordance with the act herein above referred to, and to which this act is barely supplemental.

Approved December 22, 1854.

C

JOINT RESOLUTION devolving upon the Secretary of War the execution of the act of Congress entitled "An act supplemental to an act therein mentioned," approved December 22, 1854.

7 *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the duties imposed or required to be performed by the act of Congress entitled "An act supplemental to an act therein mentioned," approved December twenty-two, eighteen hundred and fifty-four, including the act to which it is supplementary, be, and the same are hereby, transferred to the Secretary of War, who shall proceed *de novo* to execute the same in their plain and obvious meaning: Provided, nevertheless, That from any amount which may be found justly and equitably due to the legal representatives of George Fisher, deceased, there shall be deducted all sums which may have been heretofore allowed and paid by the United States.

Approved June 3, 1858.

All of the above acts are unrepealed.

D

JOINT RESOLUTION relating to the claim of George Fisher, late of Florida, deceased.

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War is hereby authorized and required to revise his execution of the act of Congress entitled "An act supplemental to an act therein mentioned," approved December twenty-second, eighteen hundred and fifty-four, required of him by a joint resolution of Congress approved June third, eighteen hundred and fifty-eight, and, on said revision, to consider and give effect to all the testimony filed in said case, including certain depositions formerly rejected by the Second Auditor of the Treasury for want of authentication, but now duly authenticated, and to restate and resettle the account heretofore stated and settled by him under said resolution, and to make such corrections in the said former statement and settlement, and such further allow-

ances, if any, on account of said claim, beyond what has heretofore been allowed and paid, as in his opinion justice to the claimant shall require.

Approved June 1, 1860.

E.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That a resolution entitled "A resolution relating to the claim of George Fisher, late of Florida, deceased," passed at the first session of this Congress, and
8 approved June one, eighteen hundred and sixty, be, and the same is hereby, rescinded, and the same and all proceedings under it are hereby made null and void.

Approved March 2, 1861.

F.

WAR DEPARTMENT, *November* 23, 1860.

In compliance with the joint resolution of June 1, 1860, entitled "A resolution relating to the claim of George Fisher, late of Florida, deceased," I have revised my execution of the act of Congress of December 22, 1854, entitled "An act supplemental to an act therein mentioned." I deem it proper to preface the present award with a brief reference to the previous action of Congress and of the executive department in reference to the claim of George Fisher's representatives.

The first act passed in relation to this subject was that of April 12, 1848, (9 Stat., 712.) Under that act the Second Auditor, on the 22d April, 1848, made an award in favor of the claimants for $8,873, being the one-half the value of the property destroyed, according to his estimate. He made no allowance of interest, and he assumed, against the weight of the evidence, that one-half of the property had been destroyed by the Indians. In December, 1848, the Auditor reconsidered the case; he corrected an error of $100 in his former calculation, and allowed interest on the one-half of the value of the property from the date of the first application to Congress, until the date of the award, *i. e.*, from 1832 till 1848. By this second award the additional sum of $8,997 94 cents was allowed and paid.

In 1849, in consequence of an opinion of Mr. Toucey, then Attorney General, the Auditor again reconsidered the case, and allowed the further sum of $10,004 89, being the interest on the amount first allowed by him from the date of the destruction of the property until 1832.

All this was done under the original act of April 12, 1848. The allowances covered the one-half of the value of the property destroyed as estimated by the Auditor, with interest from the date of its destruction until the date of the award.

On the 22d of December, 1854, congress passed another act, (see 10 Stat., 835,) requiring the Second Auditor to re-examine the case;

but in consequence of an order from the Secretary of the Treasury no further allowances were made, and all executive action was suspended until after the passage of the joint resolution of June 3, 1858,
9 (see 11 Stat., p. 553,) which transferred to the Secretary of War the duties required of the Second Auditor by the act of December 22, 1854.

In pursuance of this joint resolution of June 3, 1858, I proceeded to examine the case, and estimated the value of the property belonging to Colonel Fisher, and destroyed in 1813 and 1814, at a sum only one hundred and fifty-eight dollars greater than the valuation which had been placed upon it by the Auditor. But the evidence showing that all or very nearly all the property had been destroyed by the United States troops, the whole of this sum was allowed as the principal of the claim, and interest was added from the year 1813 until the date of the award. From the amount thus allowed the previous payments were deducted, and the remainder, $39,217 50, being about one-fourth of the sum then claimed by the representatives of George Fisher, deceased, was paid to them in two separate instalments in October and November, 1858.

After this had been done, and with a full knowledge of the fact, and of the previous history of the claim, Congress passed the joint resolution of June 1, 1860. It is very plain, from the language of the resolution, and from the reports of committees previously, that it was considered necessary to require a revision of the account in detail, and that Congress regarded the estimate of the value of the property made by the Auditor—and which was substantially the same as my own—as being much less than the evidence required. It seems to be assumed by the resolution that full effect had not been given to all the testimony on file in the case. I find, on a careful examination of the depositions, substantial grounds for such an assumption. For the most part, the items in the account were fairly and fully stated, but the testimony in relation to a few others, and particularly in regard to the corn crops, demands a much higher allowance than any heretofore made by the Auditor or myself. The highest calculation of the worth of these crops, based upon affidavits, as to the quantity, quality, and price, would make their value exceed thirty thousand dollars. I have concluded to allow a little more than one-half of that sum as the mean of the different estimates.

The allowance of interest on the value of the property destroyed, besides receiving the sanction of the executive departments heretofore, has also the approval of Congress. After the lapse of so many years, this constitutes the chief element in the account; but to decide against it now is simply to say that the claimants have been overpaid, and are debtors to the United States, on their
10 own statement, to the amount of $15,191 33. I cannot bring myself to the conclusion that Congress would have required the revision of the account with a view to further allowances, if the revision were to be made on principles which would lead to the inevitable inference that too much had been allowed already.

With these views, and with an earnest desire to execute truly the

legislative will, I have revised my execution of the act of Congress of December 22, 1854, as required by the joint resolution of June 1, 1860. I have considered and given effect to all the testimony filed in the case, including the depositions formerly rejected by the Second Auditor, and have restated the account heretofore stated by me under the said resolution, making such corrections on the former statement and settlement, and such further allowances on account of said claim, beyond what has heretofore been allowed and paid, as, in my opinion, justice to the claimants requires, and which is evidently in conformity to the will of Congress.

The following is the statement of the account as thus revised and corrected:

The United States in account with the legal representatives of George Fisher, dec'd.

1813.	To 550 head of cattle, at $10	$5,500 00
	To 86 head of drove hogs	1,204 00
	To 350 head of stock hogs	1,750 00
	To 100 acres of corn on Bassett's creek	6,000 00
	To 8 barrels of whiskey	350 00
	To 2 barrels of brandy	280 00
	To 1 barrel of rum	70 00
	To dry goods and merchandise in store	1,100 00
	To 35 acres of wheat	350 00
	To 2,000 hides	4,000 00
	To furs and hats in store	600 00
	To crockery ware in store	100 00
	To smiths' and carpenters' tools	250 00
	To houses burned and destroyed	500 00
	To four dozen bottles of wine	48 00
1814.	To 120 acres of corn on Alabama river	9,500 00
	To crops of peas, fodder, &c	3,250 00
	To interest on $22,202, from July, 1813, to November, 1860, 47 years and 4 months	63,053 00
	To interest on $12,750, from September, 1814, to November, 1860, 46 years and two months	35,317 50
		133,323 18

And the sum of one hundred and thirty-three thousand three hundred and twenty-three dollars and eighteen cents I find to be justly and equitably due to the legal representatives of George
11 Fisher, deceased; from which amount there must be deducted the sums which have been heretofore allowed and paid by the United States, as follows:

By payment made April 22, 1848	$8,773 00
Payment made December 31, 1848	8,797 94

Payment made May 12, 1849	$10,004 89
Payment made October 12, 1858	22,881 28
Payment made November 6, 1858	16,346 53
	66,803 33

Which sum of sixty-six thousand eight hundred and three dollars and thirty-three cents is to be deducted from the aforesaid sum of one hundred and thirty-three thousand and twenty-three dollars and eighteen cents, and the remainder, after said deduction, being the sum of sixty-six thousand five hundred and nineteen dollars and eighty-five cents, is the amount which I find to be due to the legal representatives of George Fisher, deceased, from the United States, payable out of any money in the treasury not otherwise appropriated, under the act entitled "An act for the relief of the legal representatives of George Fisher, deceased," approved April 12, 1848, and its several supplements; and which will be paid accordingly to the administrator of the estate of George Fisher, deceased, or to his attorney in fact.

JOHN B. FLOYD, *Secretary of War.*

G.

The United States in account with the representatives of George Fisher, deceased.

July, 1813.	Claimed.	Allowed.
1. To 550 head of cattle	$5,500	$5,500
2. To 86 drove hogs, at $14	1,204	1,204
3. To 350 head stock hogs	1,750	1.750
4. To 100 acres of corn on Bassett's creek	12,500	6,000
5. To 120 acres of corn on Alabama river	15,000	9,500
6. To 8 barrels of whiskey	560	350
7. To 2 barrels of brandy	280	280
8. To 1 barrel of rum	70	70
9. To 10 barrels of groceries	400	...
10. To dry goods and merchandise in store	1,100	1,100
11. To 32 acres of wheat	1,050	350
12. To 2,000 hides	4,000	4,000
13. To furs and hats in store	600	600
14. To crockery ware in store	100	100
15. To smith's and carpenter's tools	350	250
16. To houses burnt and destroyed	600	600
17. To 4 dozen bottles of wine	48	48
18. To crop of peas, fodder, &c., on Alabama river	6,500	3,250
	51,612	34,952

The whole amount of payments heretofore made on this claim
12 is $66,803 33. As this sum is less than the interest on $34,952 from 1813 to 1848, the date of the first payment, no interest is to be culculated on the payments.

The United States in account with the representatives of George Fisher, deceased.

	Dr.	Cr.
To value of property destroyed on Bassett's creek, in July, 1813	$22,202 00	
To interest on this sum to November, 1860, 47 years and 4 months	63,053 08	
To value of property destroyed on the Alabama river in September, 1814	12,750 00	
To interest on this sum from September, 1814, 46 years and 2 months	35,317 50	
CONTRA CR.		
By payments made April 22, 1848		$8,773 00
By payments made Dec. 31, 1848		8,797 94
By payments made May 12, 1849		10,004 89
By payments made Oct. 12, 1858		22,881 28
By payments made Nov. 6, 1858		16,346 22
		66,803 33
Balance due the legal representatives of George Fisher, deceased		66,519 85
	133,323 18	133,323 18

War Department, *December* 28, 1860.

I certify that the above is a true copy from the records of the War Department.

A. N. DRINKARD,
Chief Clerk.

A.

Washington, D. C., *May* 3, 1861.

Henry Bennett, of New York, is hereby engaged and employed as attorney for the legal representatives of George Fisher, deceased, to collect the award or balance found due to said estate by the late Sec'y of War; and is hereby fully authorized and empowered to act for the said representatives in the collection or settlement of said award, fully in all respects, and to employ or authorize others, at his discretion, to act for him as such att'y under him.

SUSAN E. GORDON,
DAVID GORDON.

I approve of the above as far as the power is vested in me.

HAMILTON G. FANT,
Administrator.

13 *Petition.*

U. S. Court of Claims.

HAMILTON G. FANT, administrator of GEORGE FISHER, deceased, *vs.* THE UNITED STATES. } No. 1885.—Filed May 6, 1863.

To the honorable judges of the Court of Claims of the United States:

Your petitioner represents and states that Hamilton G. Fant, at the request of said David Gordon and Susan E. Gordon was duly appointed administrator of the estate of said George Fisher, deceased; that the facts in relation to the claim of the heirs and legal representatives of the said George Fisher, deceased, are truly stated, as he believes, in the foregoing petition of the said David Gordon and Susan E. Gordon, his wife, to which this petition is annexed; and your petitioner refers to and adopts all the various matters stated in their said petition without here again repeating the same, as set forth and stated in the said petition of said Gordon and wife, and unites with them in their application to this court, and prays for the relief in the premises which is claimed by them in their said petition, and for such other relief as this honorable court may deem proper.

HAMILTON G. FANT,
Administrator of George Fisher, deceased.
By HENRY BENNETT, *his Att'y.*

WASHINGTON CITY,
District of Columbia, ss:

On this 6th day of May, 1863, before me personally appeared Henry Bennett, att'y at law, who being by me duly sworn, deposes and says that he believes the facts stated in the foregoing petition, and in the petition of the said Gordon and wife, to which this is annexed, are true, and that he claims to appear and act as the attorney for the said Gordon and wife, and for the said Hamilton G. Fant, as administrator as aforesaid, under and by virtue of the written power of attorney which is hereto annexed, marked (A,) and under a written agreement made and signed by the said parties, respectively, at the same time, which he is ready to produce at any time to this court.

(Stamp.) HENRY BENNETT.

Subscribed and sworn before me this 6th May, 1863.

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

On the 1st of June, 1863, and on motion of the solicitor for the United States, an extension of time to plead was allowed in this case.

On the 2d of June, 1863, the solicitor for the United States filed the following demurrer in this case:

14 In the Court of Claims.—October term, 1863.

DAVID GORDON *and al.*, adm's of GEORGE FISHER, dec'd,
vs.
THE UNITED STATES.

And now come the United States, by Charles Gibson, their solicitor, and say, that the said petition and the matter therein contained, in manner and form as the same are above set forth and stated, are not sufficient in law for the said claimant to have and maintain his action thereof against the United States, and that the said United States are not bound to answer the same. And this he is ready to verify.

And the said United States show to this court the following causes of demurrer to the said petition:

1. That whereas the said claimants demand from the United States an amount of money, alleged to have been awarded to their intestate by the Secretary of War, the petition does not set forth any express promise or undertaking by the United States to pay said amount of money, or any facts from which such a promise or undertaking is to be implied.

2. That whereas the claimants demand payment of a sum of money which they say the Secretary of War was authorized by an act of Congress to award and did award to their intestate, the petition further shows, that by a subsequent act of Congress, the act under which the award had been made was repealed, and the award itself, together with all other proceedings under said act, was made null and void.

CHARLES GIBSON, *Solicitor.*
By J. D. McPHERSON,
Asst. Solicitor.

JUNE 24, 1863.

On the 19th of September, 1863, Henry Bennett, esq., counsel for the claimant, filed in this case the following joinder in demurrer:

In the Court of Claims.

DAVID GORDON, adm'r, and SUSAN E. GORDON, administratrix of GEORGE FISHER, deceased,
vs.
THE UNITED STATES.
} Joinder in demurrer.

And the said David Gordon, administrator, and Susan, administratrix of George Fisher, deceased, come and say, that the said petition
15 and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for them to have and maintain their aforesaid action thereof against the United States; and that they are ready to verify and prove the same as the court here shall direct and award.

Wherefore, inasmuch as the United States have not yet answered the said petition, nor in any manner denied the same, the said claimants pray judgment for the amount of said award and their damages, by reason of the non-payment thereof, to be adjudged to them, &c.

HENRY BENNETT,
New Berlin, N. Y., Att'y for Claimants.
DAVID GORDON and Wife,
No. 40, *Lexington street, Baltimore.*

JUNE 24, 1863.

16 In the Court of Claims.

DAVID GORDON and SUSAN E. GORDON, adm'rs of GEORGE FISHER, deceased,
vs.
THE UNITED STATES.

HAMILTON G. FANT, adm'r of GEORGE FISHER, deceased,
vs.
THE UNITED STATES.

The petitions in the above entitled cases having been filed together in the same claim, by the same attorney, stating the same facts, and praying for the same relief; and it being represented in open court, on the 5th day of October, 1863, by Henry Bennett, esq., counsel for the claimaints, that since the filing thereof, the said Hamilton G. Fant has ceased to be such administrator, and that the said David Gordon has been duly appointed administrator, and the said Susan E. Gordon administratrix of the said George Fisher, deceased, and now represent all the parties interested in said claim, it was, on motion of the said Henry Bennett,

Ordered, that said petitions be consolidated and regarded as one petition, and that said claim be hereafter prosecuted, there-
17 fore, in the name of said David Gordon and Susan E. Gordon, as such administrator and administratrix aforesaid.

On the first of August, 1863, the following certificate was filed in this case :

UNITED STATES OF AMERICA,
Washington city, District of Columbia, to wit :

To all whom these presents shall come, greeting :

Know ye, that on the 2d day of June, in the year of our Lord 1863, letters of administration d. b. n. of all and singular the goods, chattels, and credits, which were of George Fisher, late of Florida, deceased, were, by the orphans' court of Washington county, aforesaid, granted and committed unto David Gordon and Susan E. Gordon, his wife, the said David Gordon and Susan E. Gordon, as ad-

ministrators d. b. n., having first entered into bond with approved securities for the faithful performance of the duties thereof.

Witness: WM. F. PURCELL,
Judge of the Orphans' Court of Washington county, District of Columbia,

this 1st day of August, A. D. 1863.

Test: Z. C. ROBBINS,
Register of Wills.

18 On the 15th of October, 1863, the following amended petition was filed:

United States Court of Claims.

DAVID GORDON, administrator, and SUSAN E. GORDON, administratrix of GEORGE FISHER, deceased,
vs.
THE UNITED STATES.

Amended petition.

To the honorable judges of the Court of Claims of the United States of America:

Your petitioners, the said David Gordon and Susan E. Gordon, his wife, as such administrator and administratrix, as aforesaid, respectfully represent and state to this honorable court that they are citizens of the United States and residents of Washington city, in the District of Columbia, and have been duly appointed administrator and administratrix of the said George Fisher, dec'd, and are now the legal representatives of said deceased. That said George Fisher, deceased, in his lifetime was a true and loyal citizen of the United States, and died on or about the fifteenth day of November, 1841.

That during his lifetime a large amount of property belonging to him was taken or destroyed by the United States troops in 1813. That soon after, (in 1816,) the said George Fisher, dec'd, made application to Congress for compensation for said property, and for his losses and injuries by reason of the loss thereof. And after the death of the said George Fisher, deceased, the said application was renewed before Congress by his legal representatives, and upon such application proof was duly made of his ownership of said property, of the taking or destruction thereof by the troops of the United States, of its value, and of the other facts necessary to establish said claim. That the following is a brief list of the principal items of said property so taken or destroyed as aforesaid, viz:

550 head of cattle.
86 drove hogs.
350 head of stock hogs.
100 acres of corn on Bassett's creek.
120 acres of corn on Alabama river.
8 barrels of whiskey.
2 barrels of brandy.

19 1 barrel of rum.
10 barrels of groceries.
Dry goods and merchandise in store.
32 acres of wheat.
2,000 hides.
Furs and hats in store.
Crockery ware in store.
Smith's and carpenter's tools.
Houses burnt and destroyed.
Four dozen bottles of wine.
Crop of peas, fodder, &c., on Alabama river.

That the present value of said property would, as your petitioners believe, be over $200,000.

Your petitioners further state, that after many years' delay this claim was acted upon by Congress, and a special act passed for the relief of the legal representatives of George Fisher, deceased. That the following is a copy of said act:

AN ACT for the relief of the legal representatives of George Fisher, deceased.

Be it enacted, &c., That the Second Auditor of the Treasury of the United States be and he is hereby authorized and required to examine and adjust the claims of the legal representatives of George Fisher, deceased, on principles of equity and justice, and having due regard to the proofs for the value of property taken or destroyed by the troops of the United States engaged in suppressing Indian hostilities in the year 1813, and that the said legal representatives be paid for the same out of any money in the Treasury not otherwise appropriated.

Sec. 2. *And be it further enacted*, That if it shall be found impracticable for the claimants to furnish distinct proof as to the specific quantity of property taken or destroyed by the troops and by the Indians, respectively, it shall be lawful for the said accounting officer to apportion the losses caused by said troops and Indians, respectively, in such manner as, from the proofs, he may think just and equitable, so as to afford a fair and full indemnity for all losses and injuries occasioned by said troops, and allow the claimants accordingly: *Provided*, That nothing herein contained shall authorize any payment for property destroyed by Indians.

Approved April 12, 1848.

[See Statutes at Large, page 712, vol. 9.]

And your petitioners do further state that said act was passed upon the application and for the relief of the legal representatives of the said George Fisher, deceased, and was duly accepted by them; and that under said act, said Second Auditor proceeded to examine and adjust the said claim. But upon said adjustment said Auditor rejected and refused to consider a part of the depositions and proof of the claimants, he holding that such depositions and proof were not properly authenticated. Said Auditor made an award on the 22d

of April, 1848, allowing for one-half of a part of said account, which he regarded to be sufficiently proved, assuming, without evidence, and in fact, as your petitioners claim, against the evidence, that the Indians had destroyed or taken one-half of said Fisher's property, and rejecting the other part of said account entirely, upon the ground before stated. This award amounted to $8,873. Upon the part of the claims or account allowed, said Auditor did not allow any interest or any compensation in any way for the losses and injuries sustained, and only allowed one-half the value, according to his estimate, of a portion of the property taken or destroyed.

Your petitioners further state, that in December, 1848, said Auditor reconsidered the case, and corrected an error of $100 in his former calculation, and allowed interest on the one half of a part of said property (before allowed by him) from the date of one of the claimants' application to Congress for relief, in 1832, to the date of his said first allowance in 1848. This second allowance amounted to $8,997 94.

Your petitioners further state, that it was claimed by the legal representatives of the said George Fisher, deceased, that they were entitled to interest upon the value of the property taken, at the rate of interest where said property was taken by said troops. And this question of interest, and for what time to be allowed in this case, and at what rate, was submitted by the claimants on the one part, and by the said Auditor and Secretary of the Treasury on the other, to the decision of the Attorney General of the United States, he being the law officer of the government, and the proper person to decide the same. And the said Attorney General, after examining the case, decided that claimants were entitled to interest under said act, from the time of the taking or destruction of said property until payment was made, at the rate of six per cent. The following is a copy of said decision, viz:

"ATTORNEY GENERAL'S OFFICE, *February* 16, 1849.

"SIR: In administering the relief provided by the act of Congress for the legal representatives of George Fisher, deceased, approved April 12, 1848, it being held by the Second Auditor that the value of the property taken or destroyed, with interest upon it, is to be paid as '*a fair and full indemnity*,' it would seem to follow, of course, that the interest should be computed from the time the property was taken or destroyed by the troops of the United States.

"As to the rate of interest, it is not fixed by any contract, nor is interest to be paid in pursuance of any contract. It is referred to as a measure of what is deemed, under the law and the practice of this government, a fair indemnity for the detention of the value, and that is six per cent. per annum *during the period of the detention.*

"I have the honor to be, very respectfully, your obedient servant,

"ISAAC TOUCEY.

"Hon. R. J. WALKER, *Secretary of the Treasury.*"

Your petitioners further state, that, as advised, they insist that such decision so made was and is binding and conclusive upon the

Supreme Court of the United States.

No. 293.

DAVID GORDON, Ads., et al., Appellants,
vs.
THE UNITED STATES.

Brief for the United States.

This was an action brought in the Court of Claims to recover a sum of money found due to the claimants by an instrument of writing, signed by the Secretary of War, on the 23d of November, 1860.

The demurrer objects that the petition does not state any express promise on the part of the United States to pay the same, or any facts from which such a promise is to be implied.

Averments in the petition.

1. That, in the year 1813, a large amount of property belonging to the decedent was taken or destroyed by the troops of the United States.

2. That the decedent subsequently made application to Congress for compensation for said property, and for his losses and injuries by reason of the loss thereof.

3. That he died in the year 1841 without having obtained relief.

4. That after his death his legal representatives renwed the application to Congress, and, after some years' delay, a series of acts were passed for the relief of the legal representatives of George Fisher, deceased, under which various adjustments of their claims were made, and sundry sums of money were allowed

and paid to them; and, finally, a settlement and allowance was made by the Secretary of War, on the 23d of November, 1860, under an act approved June 1, 1860, allowing the sum now claimed; but the Secretary of the Treasury refused to pay the amount due; and, finally, Congress, on the 2d of March, 1861, repealed the act of June 1, 1860, and declared all proceedings under it null and void.

Points.

1. *The only cause of action set up in the petition is the settlements, adjustments, allowance or award made by the Secretary of War on the 23d of November*, 1860. The injuries and losses caused by the troops of the United States, not alleged to have been committed by authority of the United Stetes, give rise to no claim which could be prosecuted in the Court of Claims. Nor does the petitioner now claim upon the original cause of action.

2. *If the instrument of writing executed by the Secretary of War, on the 23d of November*, 1860, (*see p.* 19) *is not an award made in pursuance of a valid submission, the demurrer must be sustained.* The instrument of writing executed by the Secretary of War, on the 23d of November, 1860, on which this suit is brought, is pleaded as an award made by him, in the execution of his powers, as an arbitrator, and no other effect is sought to be given to it.

3. That instrument is not a valid award, because there was no submission by the parties to the arbitrament of the Secretary of War.

ARGUMENT.

Submission to arbitration (when not under rule of Court) is by voluntary express agreement between the parties. Such agreement, if not directly known, may be inferred by a jury from the acts of the parties, but the law will not imply an agreement to submit to arbitration, and the Conrt will not presume it on demurrer.

The agreement must contain mutual and concurrent promises to abide the award, for the promise of one party to abide the award is the consideration for the promise of the other. And such mutual submission must be averred.—(1 Sand. P. and E., 180; Dilley vs. Polhill, 2 Str., 923; Biddle vs. Dowse, 6 B. and C., 255; Antram vs. Chase, 15 East., 209.) No such promises nor any equivalent are averred in the petition.

The submission in this case, if there was any, was in writing, and contained the several acts of Congress cited in the petition.

If these be taken as the words of both parties, they express no agreement and contain no promise to abide by any award.

They are adduced to public officers, command the performance of a specified duty in a specified manner, and direct the payment of money from the Treasury.

They contain no words of agreement, no words binding one party to the other, no words addressed by one party to the other, and, consequently, no words on which one party can maintain an action against the other.

But they are the words of one party only—the United States commanding acts which the other party, the claimants, could not command or join in commanding.

That these acts were passed at the request of the claimants, and for their benefit, and were accepted by them, cannot change their legal effect, or add to or detract therefrom. Their application and their acceptance derive their signifiance from the act of Congress. If that be a submission, they applied for a submission and accepted a submission; if it be a command from a superior to a subordinate, they applied for a command and accepted a command.

The construction given at the time by the parties to the several acts of Congress, negatives the idea that either party was bound as by an award. Each of the acts of Congress was conceived in the same terms and was as perfect a submission as the act of June 1, 1860, and the settlement under it was as perfect an award as that made by the Secretary of War the 23d of November 1860, on which this is brought; yet the claimants had no hesitation in renewing their demands upon Congress, and the Department again and again, and instead of one award, four awards were made, each conclusive upon the United States, if the one now sued on be an award, but neither of them in the slightest degree binding on the claimants, or constituting obstacles whatever to his recovery of one position after another of his constantly growing demands.

The award, so-called, was not delivered to them, nor had the Secretary of War power under the act to deliver it; it was filed in the Treasury, and belongs to that Department and not to the claimant.

The case of Kendall vs. The United States (12 Pet., 524) is clearly distinguishable from this.

It is unnecessary to consider the effect of the repealing act of March 2, 1861, if the foregoing views be sustained.

JNO. D. McPHERSON,
Assistant Solicitor Court of Claims.

DECEMBER 17, 863.

No. 293.

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Supreme Court of the United States.

DAVID GORDON, Administrator, and SUSAN E. GORDON, Administratrix of George Fisher, deceased, *vs.* THE UNITED STATES.

Claimants' brief on appeal.

A majority of the Court of Claims gave final judgment against claimants upon a demurrer to their *amended petition* in this case. (*The demurrer argued and decided was to the amended petition.*) Claimants have duly appealed to this Court.

A BRIEF HISTORY OF THE CASE.

In 1813, the property of Colonel Fisher was taken and used or destroyed by the United States troops, in the then Territory of Mississippi, during the war with the Creek Indians, claimed and proved to be then of the value of $51,612; its present value would be over $200,000. In 1816, he applied to Congress for compensation for his property, and for the damage he had sustained. His application was continued by him up to his death, in 1841, and afterwards by his legal representatives —(1 *vol. Private Claims*, 630, *&c.*) After thirty-five year's delay, Congress passed an act, approved April 12, 1848, allowing this claim, and making an appropriation to pay it, and requiring the Second Auditor to adjust the claim "upon principles of justice and equity," and "so as to afford a *fair and full indemnity* for *all losses and injuries* occasioned by said troops, and to allow the claimants accordingly."

In adjusting the amount of the claim, the Second Auditor disregarded the proof as to the value of the property taken, but made an abitrary estimate of its value at about *one-fourth part* of what was claimed according to the proof, and then assumed that one-half of the property was destroyed by the Indians. In order to make this assumption, he rejected the evidence of several witnesses as not duly authenticated, and disregarded the evidence of Thomas Barry, another witness. Estimating the property at *one-fourth* its value, and then rejecting one-half of that amount, he only allowed $8,873. He twice corrected this estimate to correct a mistake of $100 and to add interest, under the decision of the Attorney General. But his allowance for the property, or rather one-half of it, was only $8,973.

An application was made to Congress by claimants for relief against this rejection of evidence and disallowance of the greater part of their claim by the Auditor. Congress passed another act, approved December 22, 1854, requiring the Auditor "to re-examine the case, and to allow the claimants the benefit of the testimony rejected for want of authentication," provided it was then duly authenticated, and to adjust the claim in accordance with the act of 1848.

After this supplemental act was passed, the Auditor refused to examine the case as required by the act, and the case was again presented to Congress in 1857, 1858, and 1860. The reports of three different committees in the Senate and House will be foumd embodied in House Report No. 467, first session of the thirty-fifth Congress, each insisting that *interest* was allowable by the terms of the act of 1848, and as settled by the decision of the Auditor and two Attorney Generals in this case. That the Auditor was an *arbitrator* in the case; that he had deducted half of *his* estimate of the value of the property upon "a mere presumption," which he could not have made if he had not rejected the evidence *Harrison, Davis, and Turner*, and

disregarded the evidence of Thomas Barry; that he had under estimated the property, and ought to have allowed the claimants for each item of the property fairly established by the evidence; that the testimony rejected is now legally authenticated; that the adjustment was exclusively confided to the Second Auditor, and no other officer could intervene; that *full indemnity* necessarily includes *interest*, and that this question was *res adjudicata*, and that the laws, if executed, were sufficient to afford "full indemnity" to the claimants. These were the conclusions adopted by three different committees and approved by Congress, and these reports will show that all the facts of this case were well understood and carefully considered by Congress.

Afterwards, in order to compel the execution of these acts, Congress passed a joint resolution, approved June 3, 1858, requiring the Secretuay of War to adjust the claim under said acts. In examining the case the Secretary received the evidence showing that all the property was destroyed by the United States troops; but adopted, substantially, the estimate of the Auditor as to value, and only allowed $9,131 as the value of the one-half of the property rejected by the Auditor, with interest upon that sum; both allowances for the property amounted only to $18,104, *or only about one fourth its value as claimed and proved.* Both these allowances, by the Auditor and Secretary, including principal and interest, were paid, and have nothing to do with the question arising in this case, and are only stated as a part of the history of the case.

Afterwards an application was made by claimants for relief, upon the ground that the evidence had been disregarded, and an under-estimate placed upon the value of the property. And Congress, with full knowledge of all the facts, passed a joint resolution, approved June 1, 1860, requiring the Secretary of War *to re-examine the whole case, to give effect to all the evidence on file*, and to make such "*further allowances*" as in his "*opinion*" justice to the claimants required. Accordingly, the Secretary of War re-examined the whole case, giving effect to the evidence on file, and making such further allowances as, in his *opinion*, justice required. He says in his award that he "found upon a careful examanation of the evidence, substantial grounds for the assumption by Congress that "*full effect had not been given to all the testimony on file*," and that the estimate of the value of the property was "*much less than the evidence required.*" He accordingly, in compliance with the law, increased the allowance for the value of the property $16,848, and allowing interest, awarded the sum due to claimants to be $66,519 85. This award was duly made and published on November 23, 1860, in all respects in conformity to the law.

In making this allowance the Secretary of War adopted the *lowest estimate* in every instance, which he could adopt, *giving effect to the evidence*, and still rejected all of the amount claimed and proved, $16,660, allowing for the property (including both former allowances) only $34,952, instead of $51,612, he allowing only about *two-thirds* of the value of the property, as claimed and proved; and only about *one-half* of what was *then* claimed

Any additional allowance upon this claim, was strongly opposed by the Auditor and others in the Treasury Department, who insisted the law was in conflict with their regulations, and set up their opinions against the acts of Congress. And Congress, by its adoption of the reports of its Committees repeatedly censured this opposition severely, and insisted upon the full execution of the law. After the award had been duly made and published, *on the 23d of November*, 1860, these persons taking advantage of

the feeling against the Secretary of War, (caused by his treasonable conduct afterwards in aiding the rebellion) were able to obtain a joint resolution, approved *March* 2, 1861, declaring the resolution of June, 1860, "*rescinded*," and all proceedings under it "*null and void*."

As alleged by claimants in their *amended petition*, the award was fairly made, after a full hearing of both parties, and in all respects in strict conformity with the law, and for no more than was justly and equitably due, after deducting all just credits and set-offs. And this repealing resolution, (which did not extend to any of the previous acts, resolutions, or appropriations,) was the only reason, as they state, why payment of said award had ever since been refused. And they claimed payment of said award or for such other relief as might be proper. *See amended Petition.*

The United States demurred specially to the *amended petition.*

1. Because a promise to pay the award was not alleged.

2. Because by a subsequent act Congress had repealed the law under which the award *had been made*, and declared all proceedings under it null and void. *See Demurrer and Joinder.*

The Solicitor for the United States declined to argue the second ground of demurrer. And claimants' counsel, regarding it abandoned, only incidentally alluded to it.

A majority of the Court of Claims decided that the demurrer was well taken and dismissed the *amended petition* solely upon the ground that the resolution of June 1, 1860, and the award that had been made under it on the 23d of November, 1860, "*became null and void by the force and effect of the resolution of repeal of March* 2, 1861. And this was the only question decided by the Court of Claims; and is the only question presented for review in this Court by claimant's appeal.

As the *facts* stated in the *amended petition* are all admitted by the Demurrer, it is to be assumed *the award was right and just*, and only for the amount justly due, and was made in all respects in conformity with the law. *And the former allowances can in no way affect the question presented,*

I. After an award or judgment has been regularly obtained under a valid and existing law, a repeal of the law cannot impair the validity of such award or judgment. Did the repeal of the law organizing the courts of this District render "null and void" all their former judgments and proceedings? Or would a repeal of the act creating the Court of Claims render all its past judgments and proceedings "null and void?" The learned judge who delivered the prevailing opinion, concedes that in a case he refers to, this court *intimated* an opinion that vested rights acquired under a statute would not be diverted by its subsequent repeal, (the question did not arise in that case.) But, he adds, the court have left the question "at least in doubt." And that in this case *the point* is fairly presented. In this the learned judge is certainly correct; it is the only question decided in this case, or presented by this appeal to the appellate court.

Claimants maintain:

First. That the validity of the award must be determined by the law as it stood at the time it was made; and that it stands precisely as if no repealing resolution had ever been passed.

Second. That no authority is cited, or can be found, to justify the decision made in this case; and it is in violation of the elementary rules of law, and the plainest principles of justiee.

Third. That if anything can be settled beyond doubt, both upon principle and authority, this question is so settled.

In Fletcher vs. Peck, this court held that a grant made by the Legislature of Georgia could not be *annulled* by a subsequent repeal, although the grant had been improperly obtained The court say: "*If an act be done under a law, a subsequent legislature cannot undo it. The past cannot be recalled by the most absolute power.*"—6 Cranch, 87, 185, &c.

In Dash vs. Van Vleeck, Justice Spencer, in reference to the power of the legislature, says, "*that it could not 'annul' an existing judgment because there immediately arises a contract against the party adjudged to pay a sum of money in favor of the party to whom it is awarded.*—7 John 477; 10 N.Y. Rep. 393 (6 Selden.)

In the last case cited it was held, "*that the money adjudged to be paid to a party was his property, in a legal sense, cannot admit of a doubt. He owned it, and had a legal title to it.*"—10 N. Y. Rep. 396. (6 Selden 396.)

In the same case it is held, that a *statute* is not "due process of law," that can only be by a *suit* before a *judicial* tribunal.—4 Hill 146, 147; 15 Wend. 519; 6 Selden 396; 10 N. Y. R. 396.

In the case of The People vs. the Sup. of Westchester, it was held that both "upon principle and *authority* it is well settled that vested rights acquired under a statute cannot be divested by the repeal of the statute."—4 Barbours, N.Y., 60, 70, 75.

Same decision, 10. Barbour, N. Y., 223, 244.

In the case of State of Penn. vs. The Wheeling Bridge Co., Justice Nelson, in delivering the opinion of the court, says: "It is urged that the act of Congress cannot have the effect and operation to *annul* the judgment of the court, already rendered, or the rights thereby determined in favor of the plaintiff. *This, as a general proposition, is certainly not to be denied, especially as it respects adjudications upon the private rights of parties.*" —18 How, R. 421, 431.

An award stands upon the same ground as a judgment.—3 Bl. Com. 16, 160 to 164.

"It is not in the power of the legislature to give a statute a retrospective operation so as to divest vested rights acquired under a will."—8 Maryland, R. 551; Wilderman vs. The Mayor, &c.

A party cannot be divested of his property or rights by legislative authority.—Good vs. Lercher, 12 Ohio, R. 394; Norman vs. Heist, 5 Watts & S. Penn. 171; Medford vs. Larned, 16 Mass. 216; McClouglery vs. Segon, 9 Cowen, N. Y., 664; Jackson vs. Wright, 4 John. N. Y., 79; Englishbee vs. Holmutte, 3 Conn.,

295; Holyoke vs. Haskins, 5 Pick. 20, 920, 259; 12 Sergt. & Rawle, 339; 23 Miss., 270; 16 Mass., 86.

A repealing statute does not affect those suits or proceedings which have been decided and *fully determined* under it before its repeal.

Sedgwick on Const. Law, 129 to 137, 167 to 177, and 188 to 198, and cases cited. Reg. vs. Goodwin, 4; Moore & Hague, 341, 351.—7 Cranch, 164.

"And when a right in the nature of a contract has become vested under a statute a repeal does not disturb it."—Sedgwick, 133, and note.

Puffendorff says: "A law can be repealed by the lawgiver, but the rights that have been acquired under it when it was in force do not thereby cease. It would be an act of absolute injustice to abolish with a law all the effects it had produced."—Droit de la Nat. L i c 6. §6, Helmere vs. Shuter, 2 Shaw, 17; Couch vs. Jeffries, 4 Bun., 2470; 1 Black. Com., 46; 6 Cranch, 87; 9 do., 43; 4 Wheaton, 519.

The Legislature can no more revoke its grants than a donor after delivery can revoke his gift.—7 Conn., 44; 10 Conn., 514; 17 John., 215; 8 Wheaton, 1; 10 How, 191, 218; 7 Cranch, 165; 18 How, 330; 4 Barbour, 296.

A statute takes effect from the day it is passed: and a statute affecting or changing vested rights in considered unconstitutional and void.—1 Kent's Com., 455 and note E; 2 Cranch, 272; 8 Wheaton, 592; 2 Peters, 657; Smith's Com. on Const. Law, 881, and 760 to 770, and 895 to 775.

"Vested rights acquired under a law are not affected by its repeal."—Smith §760, 761, 762, 763, 764, 766, 767 (Dwarris says the repeal does not affect transactions *passed and closed*) and §775, and cases cited.

An attempt by Congress to do more than to repeal the law, namely, to pronounce *judgment* upon the effect of the repeal by declaring the award "null and void" could not give any greater "force or effect to the repeal." As Congress has only *legislative* power and no *judicial* authority (Const. Articles, 1, 2, and 3.) And this was an attempt to usurp and exercise *judicial* authority, which is not conferred upon Congress. It was an invasion of the rights of the *judiciary*.

Assuming that some defense existed to this award, so that it might have been set aside or declared void by the judgment of a competent *court* in the due course of *judicial* proceedings, with the parties regularly before it and after a proper hearing. *Congress has no power to try such an issue or pronounce judgment in such a case.*

But here no defense is set up or pretended to this award. But it is adjudged to be invalid by a majority of the Court of Claims solely upon the ground that the award "*became null and void by the force and affect of the repealing resolution of March*, 1861," repealing the resolution of June 1, 1860, under which this award has been duly made and published on the 23d Nov. 1860, *four months before the repeal. No mistake or fraud to open this*

settled account is alleged. Nothing less could impeach this award.

Are the *awards, judgments, and decrees* settling private rights fairly and justly under *valid and existing laws* dependent upon the mere arbitrary caprice of legislative authority? And can that authority be exercised *judicially* by Congress at any time afterwards so as to destroy private rights and take away private property?

But it is claimed this repeal annuls our award. 1. Because the Secretary is to be deemed not an *arbitrator* but an *accounting officer*. 2. Because his award was not a *judicial* but merely a *ministerial* act. 3. Because it is said not to be conclusive upon both parties. 4. Because payment has since been refused. 5. Because Congress was dissatisfied. 6. Because the Solicitor of the court resists its enforcement.

All these considerations are immaterial upon the question—whether the repeal of the statute could affect the validity of the award previously made?

1. And beside the learned judge is in error in assuming that the Secretary of War was an accounting officer, "whose appropriate duty it was" to examine and settle matters of this kind. He was not an accounting officer. His only authority for making this award is to be found in the law of Congress requiring him to determine the amount due in this case.

It is conceded Congress may submit a matter to *arbitration*. In what stronger language could it be done? The *arbitrator* was made the sole judge. He was to decide as in his *opinion justice* required. He was constituted both judge and jury. His *opinion* upon the law and the facts of the case were to be an end to the whole matter. His *opinion* was the rule by which he was to decide. *It was made the law of the case.* This was a personal trust. In general accounts may be referred to one accounting officer or another. This claim was submitted to the judgment or *opinion* of a person specially chosen. Would it have been a compliance with this law to obtain the decision or opinion of some other person! If this act did not confer upon the Secretary of War all the power of an arbitrator by what form of words could such authority be conferred? Congress, by its committees, has said repeatedly that this matter was submitted to the *auditor* as an *arbitrator*, and that he could not transfer his authority to any other person. If the *auditor* is to be regarded as an *arbitrator* the *Secretary of War* must be. He had fuller and more ample authority, and it was exclusively confined to him. It was just such authority as is usually given to an arbitrator.

In the award the term *award* is used many times. In the pleadings both parties call it an award. If it is not an award what is its legal name?

But whether an *award* or an *account stated* or whatever it is called, can it be annulled or affected by this attempted repeal? The resolution of June 1, 1860, had been *fully executed*, and was from that moment as much a dead letter before as after the repeal.

2. And does not the learned judge err in assuming that the *adjudication* upon the evidence in this case as to what amount was justly due was merely a *ministerial* and not a *judicial* act? What more has the Court of Claims to do in deciding any case? By comparing the authority conferred upon that court with the authority conferred upon the Secretary in this case his authority will be found to be more absolute and unlimited than that conferred upon the court, and it is without *appeal.* Can anyone pretend the decisions of the court are not *judicial?* It is immaterial whether a decision is made by one judge or three, or whether he is called a judge or arbitrator, *if he has in fact full and ample authority to decide the case.*

3. And the learned judge errs in assuming that the award is binding only upon one party. Claimants' counsel insist it is binding upon both parties (see point second as submitted to the Court of Claims,) but insist that Congress might still authorize a further allowance (as a matter of favor and to prevent injustice.) But by holding as the court do that the United States are not bound, *unless they choose to be after a decision is made,* what a contemptible position is taken for the Government. It selects its own officer to decide its case. The one most deeply and personally interested to decide in its favor, tries the case before him, and takes the chances for a favorable decision. If the decision is *one-sided* enough to satisfy all the officials in the Departments it may stand, if not Congress *annuls* and repudiates it by repealing the authority of the officer who has made the award. It is the boy's play of "heads *I* win, tails *you* lose." It makes the law of Congress allowing the claim and the trial and adjustment of the amount a useless and unmeaning farce. What "*mutuality*" or *justice* is there in allowing one party to *annul* the decision and *not* the other.

4. The refusal to pay before the repeal was upon the pretext of requiring proof of the administrator's authority to receive the money (see the Auditor's letter of Nov. 28, 1860.) And afterwards on account of the repeal.

5. Congress has left upon record no reason for its disapproval but that the allowance was such as its law required and intended does abundantly appear (see the reports of the committees aforesaid,) and that the law was passed with full knowledge of all the facts.

It does not appear for what *reason* or upon what *representations* the repeal was made—whether by the procurement of those who had so strenuously opposed the execution of the law or in consequence of the prejudice against the Secretary. As it stands it would seem to be a mere arbitrary act of caprice on the part of Congress. But if this decision is upheld it invades and destroys the vested rights of private parties regularly acquired under the law.

6. It is made the duty of the Solicitor of the court below to appear and act for the United States in all cases. If that is to be *judicially* regarded as evidence that the claim is unfounded, no claim could ever be allowed. The argument proves too much.

In justice to the Solicitor it should be said *he declined to argue the only question decided by the court in this case.*

As arguments appearing in the prevailing opinion it was deemed respectful to give to these matters a brief reply. But it is submitted that none of these considerations can have any bearing upon the question involved as to the *constitutional* power of Congress, or as to the "force and effect" of a repealing statute upon the vested rights of private parties that had been previously adjudicated under it.

As to the law upon this question, we refer the court to the *annexed brief*, used in the Court of Claims.

No matter what the *arbitrator* is called. *He had authority to decide.* No matter what the *award* is called, *it was a legal adjustment of this claim.* We insist it is not in any way affected by the repeal. That the repeal cannot annul it. It stands just as if there had been no repeal. The repeal is no *answer or defense.* "*It was an act done under a law, and cannot be recalled.*" —6 Cranch, 87, 135.

II. As stated in the *opinion* the entire sum allowed by the Secretary of War was composed wholly of interest. This is a grave error, and one which the learned judge would not have made had he examined the petition before deciding the case.

As appears by the *record* the Auditor only allowed for principal $8,973, and the Secretary of War only allowed for principal $9,131. Interest was allowed by each, and both the principal and interest paid. *These cannot be reconsidered or recalled.* After this Congress deemed these allowances to be insufficient, and required a *re-examination of the whole case, and that effect should be given to all the evidence on file*, and such "further allowances made as in the *opinion* of the Secretary justice required. And he complied with the law, and made the further allowance for *principal* of $16,848, which, with the interest then due, made up the award, still rejecting $16,660 of the principal claimed. This all appeared by the record.—See Amended Petition.

1. *Interest was allowable under the act of* 1848.

The 2d Section of the Statue for our relief commands that the claimants shall be "afforded *a fair and full* IDEMNITY FOR ALL LOSSES and INJURIES occasioned by said TROOPS, and says to the Secretary, "and *allow the claimants accordingly.*"

Now, what are the authorities relied upon to sustain the right to indemnity, damages, or interest? for they are all synonymous, and are substantially the same thing.

1st. We rely upon the mandatory language of the law.

It is not permissive only, it does not say you *may* allow it, but it says it shall be done.

Now for a few judcial and legal authorities:

Rutherforth, in his chapter of "reparation for damages done," lays down the rule thus:

"In estimating the damages which any one has sustained where

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such things as he has a perfect right to are unjustly taken from him, or withdrawn, or intercepted, we are to consider not only the value of the thing itself, but the value likewise of the *fruits* or *profits* that might have arisen from it. He who is the owner of the thing is likewise the owner of such *fruits* or *profits*. So that it is as properly a damage to be deprived of *them* as it is to be deprived of the thing *itself*." Rutherford, Inst., B. 1, chap. 17, sec. 5.

The Supreme Court of the United States has decided, that.

"The prime cost or *value* of the property lost, and in cases of injury the diminution in value by reason of the injury, with *interest* thereon, affords the *true rule* for estimating damages in such cases." 5 Wheaton, p. 385, la Amistad des Rues.

The Supreme Court also say—

"Where trespass is brought for personal property, and no circumstances of aggravation are shown, that the action is to be regarded as one of trover, and the value of the property, *with interest*, furnishes the measure of damages." See "Sedgewick on the measure of damages," pp 549, 50, 51.

The same rule has been sanctioned by the decisions of all the State courts of the Union, in actions to recover damages for injuries to or deprivation of, property, whether in the form of trespass, case, trover, replevin, or detenue, and is the general and only rule or measure of damages in all actions sounding in *tort*, for injury to property.

"In *trespass* for an injury done to property, the value of the property, at the time of the injury, *with interest* thereon from that time, is the measure of damages." U. S. Digest, p. 510, cities Brannin vs. Johnson, 1 Appleton's (Maine) Rep., p. 361.

The same rule is laid down in Soule vs. White, 14 Maine Rep., p. 436; also in Boyden vs. Moore, 11 Pick., 363; Swift vs. Barnes, 16 do., 194, and in Boyd vs. Brown, 17 do., 453.

"And generally, where the plaintiff has been deprived of the *use* of his property for a time, by the act complained of, the value of the *use* during such period is to be taken into the estimation of the damages." 2 Greenleaf's Ev., p. 591, cities Warfield vs. Walter, 11 G. & J., 80; Hammett vs. Russ, 4 Shepl. 171.

So in *trover*, ib., Greenleaf, p. 612, cites 2d *McLean*, 145, (155) and other authorities.

"In *trover* the measure of damages is the value *of the property* at the time of the conversion, *with interest*," 17 Pick., p. 1; 21 do., p. 559; 1 Metcalf, 172 7 Monr. 209; 2 Hill, 132; 14 John, R. 273; 4 Pick., 466; 3 Bibb, 92; 3 Littell, 25; 7 Metcalf, 354.

"In *trover* the value of the property at the time of the conversion, with *interest* on that amount, is ordinarily the measure of damages." 2 Greenleaf, p. 282; § 276, cities 11 Camp., 477; per Lord Ellenborough; 14 Pick., 356, 361; 15 do., 198 206, 207; ib., 297, 300; 17 do., 1; 5 H. & G., 212; Sedgewick on damages, chap. 19.

"In *detenue* the plaintiff may recover in damages the worth of the *use* of the thing, as the hire of a slave, during the time of the unauthorized detention." 4 Dana, p.

Mr. Sedgewick says, p. 517, that "interest seems to be ususally given *by way of damages* for the detention of the property."

In Wilson vs. Conine, 2 John. R., 280, the court said, "the jury were competent to allow *interest* on the value of the chattel from the time of the conversion, *by way of damages*.

To the same effect see Bissell vs. Hopkins; 4 Cowen, 52.

The Supreme Court of N.Y. said, in Hyde vs. Stone, 7 Wend., 354: "The plaintiff was *entitled* to interest, *by way of damages*, from the time of the conversion."

The same court said, in 7 Cowen, 294, Dillenback vs. Jerome, that "INTEREST is *properly* given in *trover* as well as the value of the property converted."

Cowen, J., said "the action is *trover* which goes for the actual value and interest."

Hon. Langdon Cheeves, sitting as U. S. Commissioner, on the subject of Indemnity, lays down the rule as follows:

"Indemnification means a reimbursement of a loss sustained; if the property taken away on the 17th February, 1815, were returned now uninjured it would not reimburse the loss sustained by the taking away and consequent detention; it would not be an indemnification. The claimant would still be unindemnified for the loss of the *use* of his property for ten years, which, considered as money, is nearly equivalent to the original value of the principal thing. So, in substituting a pecuniary value for the thing, unless interest is allowed for the use of the money the claimant will remain unindemnified."

The claim is not of interest *eo nomine*. It is adopted as a *mitigated* rule of damages, compensation, or indemnification, founded on the estimated pecuniary value of the article withheld. In that case the common law and the civil law are both clear in allowing reparation of the loss of the *use* of the thing withheld from the commencement of the tortuous detention. The rule of the *public law* is the same."

Again:

Mr. Attorney General Wirt says—

"What is a just indemnification for a wrong? Is it the reparation of the *one-half or two-thirds* of that wrong? Is it anything less than a reparation of the whole wrong? On these few simple ideas the whole question turns.

"If an injury is *justly redressed* which is only *half redressed*, then the British commissioner is right; but if an injury is only redressed when the redress is commensurate with the whole extent of the injury then he is wrong. Let us put aside the emphatic and striking word *just*, and take the word indemnification alone. What does the word indemnification mean? The *saving harmless from danger*. Is that man saved harmless from danger who is left to bear one-half of *the damage* himself? The question seems to me too plain for discussion."

Attorney General Butler says:

"It is obvious that the difference in the *value* of the vessel is not the whole loss sustained; the beneficial *use* of the vessel is also lost to the party during the whole period of the detention;

and for this loss interest on her prime value is but the *lowest rate* of indemnification."

The committee, in the House of Representatives, on the case of George Galpin, 1st Session, 31st Congress, Doc. 334, composed of Messrs. Disney, Featherstone, Mann, Burt, and Jackson, though against the allowance of interest in Galpin's case, admit it in the case of Fisher, and, after referring to many cases where interest is allowable, says: "when the act directs 'damages' to be paid, or *indemnification* to be given, or authorizes the accounting officers to adjust the claim upon principles of equity and justice the usage permits an inquiry into the propriety of allowing interest." They refer to many cases where interest had been properly allowed.

To Mrs. O'Sullivan's, by Atty. Gen. Butler, under the term "actual losses."

To Sibbald's case, by Atty. Gen. Nelson, under term "actual damages."

To Fisher's case, under the words "*full and fair indemnity for losses and injuries.*"

They refer also to many cases particularly referred to in appendix C.

Messrs. Burt and Jackson, two gentlemen of the committee, agree substanially with Messrs. Disney, Featherstone and Mann; they adopt the rule, as to payment of interest, as laid down by Messrs. Walker, Meredith, and Whittlesey. At page 87, report, Mr. Walker says: I consider the Government may be properly called on to pay interest in the following cases: (omitting 1st and 2d) '3d, in certain cases of indemnity for losses. 4th, by way of damages for wrong done in certain cases.' 5th, when there is a decision of the Supreme Court of the United States, applicable to the case."

Mr. Meredith says that the allowance of interest is proper in "cases in which individuals have performed services or *sustained losses*, or in which the *property* of individuals has been lawfully or *unlawfully* taken, injured, or destroyed by officers, civil or military, of the United States."

Mr. Whittlesey says, page 90: "it (interest) is allowed in some instances from the peculiar phraseology of the law, as where the accounting officers are directed to *remunerate* all *losses*, or to make the person whole."

Mr. W. refers to the O'Sullivan case, and says: "In ascertaining the actual loss the Attorney General thought that interest might be estimated on the value of the vessel. The accounting officers, by the act, were clothed with the same power that a jury is in giving damages in a case of *tort;* they arrive at a result by considering various accompanying circumstances, and *interest* may, with propriety, be one element in deciding what amount of damages the defendant should pay."

In addition, see the report of the Committee on the Judiciary, 2d Session, 34th Congress, and reproduced at the last Session, by the Committee on Indian Affairs, in which the questions of law, involved in the words "fair and full indemnity," are largely

considered, including extracts from the official opinions of Attorneys General Hon. Mr. Toucey and Hon. Reverdy Johnson, all recognizing the same principle that interest is necessarily included.

Finally, the late act, or joint resolution, which requires that the previous laws shall be "executed in their plain and obvious meaning," ignoring all special pleading and forced construction, and demonstrating that the 2d section of the law of 12th April, 1848, giving us "fair and full indemnity for all losses and injuries" meant *something more than the actual value of the property at the time* taken, used, or destroyed.

In this case Atty. Gen. Toucey decided *interest* was to be allowed.—5 vol. opinions, 71.

And Atty. Gen. Johnson that this decision was conclusive in this case.—5 vol. opinions, 97.

In *trover* in actions between individuals *interest* is always allowed as *damages* from the time of the conversion of the property. By the act Congress provided that claimants were to have a *full indemnity* for all *losses* and *injuries* (that is for all *damages*) sustained. By the act some compensation must be made beyond the mere value of the property taken for all *losses* and *injuries* sustained, and that was left to the *opinion* of the Secretary. The *lowest* allowance that could be made would be interest, the same compensation allowed by law in like cases between individuals.

As an instance of the *losses* sustained take the first item: 550 head of cattle, at $10 a head, $5,500. These cattle were taken 50 years ago. Sheep are let out to double every four years—assume that cattle would let out to double every seven years. In forty-nine years the cattle would have numbered 70,400. And they would be worth per head at least four times as much as they were in 1813. The increase of the stock, and their increased value would amount to the sum of $2,816,000. The interest, at 6 per cent., for the same time, on the $5,500, would not be the one hundredth part of that amount. The interest is the *lowest* and usual measure of damages allowed in such cases, and was clearly allowable in this case, so as to afford the claimants a *full indemnity* for all *losses and injuries* sustained.

Col. Fisher and his representatives had been applicants before Congress since 1816 for payment for his property and for the damages sustained; and the law provided that a *full indemnity* should be made. This act was virtually nullified by the action of those whose duty it was to execute it. After this long delay, by the fault of Congress, and of the officers of the United States, interest should be allowed under this act or injustice must be done. In 1857 the Judiciary Committee made a report in this case in which they insist interest should be allowed under this act. They say:

"This act gives or commands *indemnity, fair indemnity—full indemnity.* But as if these words were not sufficiently emphatic the law superadds the words—'for all losses and injuries.' Now will it be contended for one moment that when the Con-

gress of the United States of solemn enactment concludes that persons in its service took private property in 1813 and appropriated the same to public use provides that payment shall be made and a fair and full indemnity afforded that the bare return of the value only would come up to the requirements of such a law? It is a solecism in terms to give such an interpretation to such a law."

"It is too late to raise the question of interest as it is *res adjudicata* settled and fixed by the officer who allowed it; and sanctioned by two successive Attorney Generals, Hons. Isaac Toucey and Reverdy Johnson."—5 App. Atty. G. 71, 97. See House Reports, No. 467, 1st Session 35th Congress; and No. 345 1st Session 36th Congress; and annexed brief, point third.

2. As to allowing interest the question is settled in this case. It is *res adjudicata*, and it cannot be now considered.

1. By the decision of the *Auditor* in 1848.
2. By the decision of Atty. Gen. Toucey in 1849.
3. By the decision of Atty. Gen. Johnson in 1849.
4. By the decision of the Secretary of War in 1858.
5. By the sanction and approval of Congress in 1857, 1858, and 1860.
6. By the decision of the Secretary of War in 1860.

All and each of these decisions are conclusive on this question. —5 Opinions Atty. G., 71, 97; H. Rep., No. 467, 1st Session 35th Congress, &c.; 6 Metcalf, 131, 165.

3. Again, under the resolution of June 1, 1860, the Secretary of War was to allow whatever was just in his *opinion*. And neither the *legality* or *justice* of his *opinion* allowing interest can be disputed. It is conolusive. 6 Metcalf, 131, 165.

4. An error in judgment in allowing or disallowing interest cannot be set up as a defense to an award, certainly not under an authority like this. (See point third of annexed brief.)

5. And in all cases where interest is allowable upon a demand (as has been settled in this case) obtaining a judgment does not change the character of the debt interest continues to run upon it until paid. This is only complying with and carrying out the the decision made in the case, which this court has no authority to examine or re-decide.—3 Paige, 100; 22 Wend, 137; 1 Sand. Pl. & Ev., 304; 6 Metcalf, 131, 165; and second point of annexed brief.

As to interest as well as principle the arbitrator was made the sole judge, and his decision was final. *It has nothing to do with the effect of the repeal*, but has been referred to because it appears to have been so much misunderstood by the court below. It is only material to show that *as it was settled interest was allowable, it follows that it should be allowed upon the claim until it is paid.*

III. Another well settled rule of law is that where property is wrongfully taken the injured party has a right to recover the highest value of the property between the time of the taking and the recovery. Here, as alleged and admitted, the value in 1813

was $51,612, and its present value over $200,000—more than *three times* the amount of our award. This rule has been carried so far as to hold, that where its value has been increased by the *labor* of the wrongdoer, as trees converted into boards, the injured party is entitled to the increased value. This rule would entitle us to our award, and more, without interest. In fact, interest is a *lower* measure of damages than to allow the increased value of the property.—Sedgwick on Damages, 483, 484, 494 478, 479, 491.

But the award is final. *The case cannot be tried again.*

IV. An allowance, even by an accounting officer, is in general conclusive, unless Congress, to prevent injustice, authorizes a further allowance. This award, and one other, where payment has been prevented by a like attempt at repeal, are the only allowances under special acts remaining unpaid. *But there are a large class of cases* where allowances have been made and paid in which claims are made for further allowances without any new law; and if it is held these cases may all be opened by the Court of Claims, and the adjustment made disregarded, that court will be crowded with these cases, and a large draft will be made upon the Treasury. The rule we contend for, making these adjustments conclusive, while it would compel the payment of this claim, would be an immense saving to the Government. Public policy and the rules of law alike require that (in the absence of palpable *mistake* or *fraud*) these adjustments should be conclusive. In this case that rule maintains our claim.—See 9 Wheaton, 691; 6 Wheaton, 135; 10 Howard, 109; 13 Howard, 478; 15 Peters, 377; 8 Peters, 375, 378; 5 Peters, 292; 3 Peters, 112; 9 Peters, 319; Andrews' Dig. 15, and note; Opinions Atty. General 1 vol, 596, 624; 2 vol., 463, 544, 515, 507, 302; 3 vol., 148; 4 vol., 378; 5 vol., 71, 97, 87, 285.

A legal adjustment should not be opened unless such mistake *or* fraud *is set up and proved as would compel the opening of a settled account in a court of equity. Here no mistake or fraud is pretended.*

V. Claimants insist they are entitled to recover upon the facts stated in the *Amended Petition*, no defense being set up, except this repealing statute, the amount of their award and interest upon their claim until it is paid, under the decision made in this case, settling the amount due by the Secretary of War on the 23d Nov., 1860; and that Congress, acting for the United United States, by its various *acts, resolutions, and appropriations* has *admitted* their claim to be justly due to them, and made *appropriations* to pay it, which are now in full force and unrepealed; and that the amount has been settled by the *person* and in the *manner* required by the United States; that the effect of these *acts, resolutions,* and *appropriations,* as *admissions* and *evidence* against the United States could not be recalled or repealed, and no attempt has been made to recall or repeal them; and, after having been accepted and acted upon by the claim-

ants, are conclusive against the United States. A resolution to recall the many years that have passed since the property was taken, and directing that it should not be taken by the troops, would not change the fact. But it would have just as much *legal effect* (and show the disapproval of Congress) as a resolution passed after the claim had been *admitted* and the amount *settled* under a valid law would have declaring *what had been* done "rescinded" or "annulled."

All these *admissions*, *evidence*, and *appropriations* still stand, and no attempt has been made to rescind or repeal them. The repeal is confined to the resolution of June 1, 1860, (which had no force after Nov. 23, 1860, when it was fully executed) certainly that repeal cannot have the "force and effect" given to it by a bare majority of the Court of Claims; and that being the only *point* decided by them, and now before this appellate court for review, their judgment should be reversed, and judgment rendered for claimants for the amount of their award and interest thereon. *After the award had been made and completed under the law it could not be unmade or obliterated, nor could the authority or evidence upon which it had been made be afterwards revoked or recalled.*

All which is respectfully submitted,

H. BENNETT, *Claimant's Atty.*

IN THE

COURT OF CLAIMS.

No. 1885.

David Gordon, Administrator, and Susan E. Gordon, Administratrix, of George Fisher, Deceased,

vs.

The United States.

HENRY BENNETT, Claimant's Solicitor,
New Berlin, N. Y.

CHARLES GIBSON, Soli'r for the U. S.

NEW BERLIN, N. Y.:
Joseph K. Fox, Printer.
1863.

U. S. COURT OF CLAI

DAVID GORDON Administrator, &
SUSAN E. GORDON, Administratrix
of GEORGE FISHER, Deceased.
vs
THE UNITED STATES.
} Claimants Bri

LEADING FACTS.

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2. A succinct history of the case, embracing all th
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3. By the award duly made, the original claim was
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and in full force.

FIRST.

The demurrer *admits* the facts, as stated and sworn
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And the only defence that can be urged agains
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U. S. COURT OF CLAIMS.

DAVID GORDON Administrator, & SUSAN E. GORDON, Administratrix of GEORGE FISHER, Deceased. *vs* THE UNITED STATES.	Claimants Brief.

LEADING FACTS.

1. This case was brought into court by original Petitions, filed May 6th, 1863; one by the said David Gordon, and Susan E. Gordon, his wife, as the principal claimants, and one by Hamilton G. Fant as the administrator of said George Fisher, deceased, (the facts being stated the same in both)—since then said Gordon and Wife have been duly appointed Administrator and Administratrix as aforesaid, and represent the estate of said George Fisher, deceased and all persons interested in said claim. They are now, as such administrator and administratrix, the only claimants. The claim is founded upon an award for $66,519 85, made by the Secretary of War on the 23d Nov., 1860, in favor of the legal representarives of George Fisher deceased, against the United States.

2. A succinct history of the case, embracing all the leading facts upon which the award was made, will be found in the award (page 7.) to which reference is made.

3. By the award duly made, the original claim was extinguished, and the authority of the Secretary of War exhausted. Four months afterwards Congress attempted to revoke his authority, and annull the award,, by Repealing the resolution of June 1st, 1860. All the other acts and resolutions relating to this claim, from 1848 down, remain unrepealed and in full force.

FIRST.

The demurrer *admits* the facts, as stated and sworn to by the claimants.

And the only defence that can be urged against this award, is the resolution of March 2, 1861. That resolution cannot defeat or impair the claimant's right to the debt which had been duly awarded them.

SECOND.

1. As no appeal was provided for, the decision of the Secretary of War was final and conclusive upon both parties.

Fletcher vs. Peck 6 Cranch 87, 155, 136 & 143.
Opinion att'y Gen. Wirt in 1823, Vol 1. page 605, Fr'ns. ed.
Opinion att'y Gen. Black. in 1858, Va. land case.
Exparte Marshall 2 Brockenbrough R. 473 &c.
The U. S. vs. the Bank, 15 Peters 401 405.
Kendall vs. the U. S. 12 Peters, 609, 611, 615.
Messick vs. Wright, 1. Grants case, [Pa.] 437 & 152.
Young vs. Laird 30 Ala. 371 &c.
Gardner vs. Masters 3 Jones Eq. N. C. 462.
Barlow vs. Todd 2 John Ch. N. Y 551.
Burchell vs. Marsh. 17 How [U. S.] 344, 349.
Green vs. Lundy 1 Coxe's R. 435.
Bulkley vs. Stewart, 1 Days R. 130, 132 3 & 153.
People vs. Supr. of Westchester 4 Barb N. Y. 64 & 70 to 80.
People vs. Murray 5 Hill N. Y. 468, 471, &c.
Sturgess vs. Crowninshield 4 Wheaton U. S. 122.
2 Cow. & Hill N. 1025, 1026, 1031, 1034, 1293.
notes, 695 & 473. 1 Esp. 377. 4 T. R. 146. 15 East 213.
4 Conn. R. 259. 1 Sand, 326. 1 Pick. 224. 2 Greenl'f 213.
2 Peters 657. 2 Hay w 310, 374. 1 Blackf. 220.
1 U. S. Dig 558.

And the matters submitted, and decided, cannot be litigated again before any other *Court* or *Tribunal*.

2 Cow. & Hill 1025, 1026, 1031, and cases cited.

In the case of *Fletcher vs. Peck* the U. S. Supreme Court denied the power of the Legislature of Georgia, to repeal a grant that had been improperly made by a preceding Legislature. The Court say:

"The Legislature of Georgia was a party to the transaction, and for a party to pronounce its own deed invalid, whatever cause may be assigned for the invalidity, must be considered as a mere act of power, which must find its vindication in a train of reasoning not often heard in Courts of justice."

"The principle asserted is, that one Legislature is competent to repeal any act which a former Legislature was competent to pass—and that one Legislature cannot abridge the power of a succeeding Legislature. The correctness of this principle so far as general Legislation is concerned can never be controverted. *But if an act be done under a Law, a succeeding Legislature cannot undo it. The past cannot be recalled by the most absolute power.*"

6 Cranch, 87, 132, 135, &c.

Attorney General Wirt maintained this doctrine in an opinion, written in 1823, he said:

"The whole adjustment of these claims being confided exclusively to the Secretary of the Navy, the amount allowed by him became a debt due from the United States, at the time of the allowance, which no other officer of the government has a right to augment or diminish by any process, whatever.

Farnhams ed. opinion att'y Gen. Vol. 1. page 605.

Att'y General Black, in his opinion of May 30, 1858, in relation to the Virginia land warrants, furnished to the Secretary of the Interior, enunciates the following legal positions, which cannot be successfully controverted.

"When the constitution or law of any state authorizes a person to decide a given question, the judgement of such person is always conclusive. It makes no difference whether it be a court, a legislative body, an executive officer, or a special tribunal appointed for the purpose. The authority to hear, examine and decide, without appeal, carries with it the power to determine it forever, to make an end of all controversy about it, and to close it against all future inquiry about either the facts or the law."

In Burchell *vs.* Marsh 17 How U. S. 344, 349, the Court say:

"Arbritators are Judges chosen by the parties," &c. "If the award is within the submission and contains the honest decision of the arbitrator after a full and fair hearing of the parties, a Court of equity will not set it aside for error either in law or fact."

In the United States Circuit Court for Virginia, Chief Justice Marshall, and associate Justice Barbour presiding: Justice Barbour said, "I take it to be a sound principle, that when a special tribunal is created with limited power and a particular jurisdiction, that whenever the power is *once* executed, the jurisdiction is at an end—that the person thus invested with the power is in the language of the law *functus officio.*" In this opinion Chief Justice Marshall concurred. (Brockenbrough's Reports, vol. 2, page 473. Exparte Randolph.)

See Decision of Judge Nelson
in Bruce Case, Manuscript.

6 Metcalf R. 131. 165.

1 Kents Com 458. 461

2. The claimants had a legal and vested right to the debt thus awarded to them (by which their claim was cancelled,) which no subsequent legislation could impair.

Fletcher vs. Peck 6 Cranch 87, 132, 135-6 & 143.
Dash vs. Van Vleeck 7 John. N. Y. 477.
2 Selden N. Y. 44, 49 & 358, 367. 2 Kernan [N. Y.] 9. 15.
2 Cow. & Hill 1025-6, 1034 & 1293, & cases cited.
4 Barb. N. Y. 64, 70 to 80. 10 Barb. N. Y. 223, 244.
18 How. U. S. 331, 380, 384 272, 421, &c. 431
1 Hill N. Y. 324, 335. 1 Wendall N. Y. 53, 54.
2 Peters 657. 17 How. 344-9. 13 La. An. 175.
11 John. N. Y. 189. 1 Grants Ca. 152, 437. 2 Duch. N. J. 13.
2 Paine C. C. 501. 2 Cranch 272. 7 Cranch 171.
1 Peters 222. 16 N. Y. Rep. 424, 431--2
2 Storys R. 571. 2 Pick. 165, 169. 28 Penn. 507.
11 Peters 102. 10 Yerger 59. 1 How. 311.
3 Jones Eq. N. C. 462. 16 Texas 574. 30 Ala. 371.
2 Swan [Tenn] 35. 24 Barb. N. Y. 87, 98. 5 Mason 201.
1 Hemp 533, 536. 14 B. Mon. [Ky.] 426. 5 Cal. 524.
1 Paige 102. 11 Paige, 484, 494. 13 Mass. 1 & 16
5 McLean 133. 1 Vesey 365. 2 Sand. 337.
1 Coxes R. 435. 4 Dana 613. 2 Litt. R. 54
1 J. J. Marsh 228. Calwell on Arb. 69, 70
14 N. Y. R. 329. 4 Comst 71. 3 Comst 511, 517 522
3 Kernan 378, 390, 395, 433, 447, 459
4 Hill 140, 146. 3 Dallas 360
2 Black. C. 396, 443, 465. 3 Do. 16, 160 to 166, 401
4 Comst 567, 575. 24 Barb. 147.

The United States were bound by the *award*, and could only discharge it by payment.

3. "An act of Congress must be *prospective* and cannot have a retroactive effect. And an act is not to be construed to operate retrospectively so as to take away a Vested right."

U.S Dig Vol 1, 537. 7 John N. Y. 477. 3 Dallas 391, 397.
2 Gallis 139. 1 Blackf 220. 2 Chip 88
5 Monr 122. 1 Chip 137. 7 Conn 550, 558
1 Bay 252. 2 Dallas 304 310. 2 Greenleaf, 275
4 Barb. 64, 70, 89. 2 Cranch 272
10 Barb. 223, 244. 6 Cranch 87

4. An *Award*, *Contract*, *Deed or Judgement* cannot be adjudicated to be "null and void" by Congress. Its validity can only be determined by the Courts, in the due course

of judicial proceedings. Congress has no such judicial authority.

U.S. Const, Articles 1, 2 and 3.
5 Cranch 115. 7 Cranch 164 2 Cranch 272
8 Indiana 298. 19 Illinois 226. 2 Dutch [N. J.] 13
4 R I. 324 4 Barb N. Y. 64, 70 and 80
10 Barb 244. 3 Kernan 378

It can be impeached in court only for corruption or misbehavior of the Arbitrator.

5. A party against whom an award is made, cannot afterwards declare it void. Such a declaration or resolution could have no effect upon the award, or the legal rights of the party in whose favor it was made.

Dougherty vs McWhorter 7 Yerg 239, 258
Cox vs Jagger 2 Cow. (N Y) 638, 650, 625
2 Gallis 61, 70 8 Peters 165.
Kyd on awards 32. 33. 16 John N Y 205
4 Comst 567, 575 6 Cranch 87, 135--6

In all submissions there is an express or implied contract to abide by the award. To declare an award void after it was made would impair the obligation of contracts. And all parties are bound by their agreements.

3 East 16 U. S Const Article 1 § 10
7 Cranch 164 9 do 52, 6 do 137, 4 Wheaton 641, 8 do 1
7 Mass 198, 4 Duer N Y 606, Note, 3 Black C 160 to 166

6. After an award has been made and published, the authority of the arbitrator cannot be revoked—as was attempted to be done in this case.

16 John N Y 205 4 Comst 567 575

Congress did not attempt to repeal the law of 1848, allowing this claim and making an appropriation to pay it.—Or the subsequent acts and resolutions relating to the claim. But only the authority of the arbitrator after it had been executed.

1 Coxe's R. 435 4 Dana 613 2 Litt R 54 2 Cow & Hill 1033

By the Resolution of June 1, 1860, the Secretary of War was required to revise and re-settle his statement of this claim and account giving effect to all the evidence on file, and to make such corrections and such further allowances "as in his *opinion* justice to the claimants may require."

The act mad
opinion could

His opinion what was just to be allowed,
the Law of the Case, 6 Mittaly 31. 1

7. After the arbitrator had made his award, his authority was at an end. He had then no authority which he could exercise, or which Congress could repeal.

Fitzgerarld vs Fitzgerarld, Hardin 227, 4 Comst 567, 575
Woodbury vs Northey, 3 Greenl 85, 1 Coxe's R 435, 225; 152

Congress attempted to act judicially, in a case that had been judicially decided. 1 Congress had no judicial authority. 2 The parties were not properly before Congress. 3 It does not appear upon what ground the exparte decision of Congress was made. 4 No investigation was had. 5 No evidence was heard.

8. Congress cannot take private property for public use, without making just compensation. This is so held upon principles of natural right, independent of any constitutional provision.

Vrttle 112, Gro 333, Puff 829, 1 Baldwin c c 205,
4 Barb 64, 10 Barb 223, 4 Hill 140, 3 Kernan 378.

But the Constitution of the United States provides that "no person shall be deprived of life, liberty or property without due process of law." "Nor shall private property be "taken for public use, without just compensation.". Am'dts to Const. Article 5.

Here the claimant's property was taken or destroyed by the United States Troops. And if this award is not paid, they are so far without remedy or compensation.

The award was their property and their right to it is as perfect as their right can be to any property.

3 Bl Con 16, 160 to 164, 4 Hill 146, 3 Kernan 378.

THIRD.

All the claims were allowed at a low sum, upon the proof, and all payments were deducted. Interest, it was conceded was allowable at 6 per cent. But complaint was made because intetest was not allowed upon payments, and for this reason the authority of the arbitrator was repealed, after it had been *executed*, and the award by Congress *adjudged* void. Interest on the payments was *not* allowable, and the repeal was passed under a mistake.

The true rule as to interest is, to cast interest upon the principal until the payments *exceed* the interest, then to deduct the payments, and cast interest upon the balance as principal, and so on as payments exceeding the interest are

made. But if the payments are *less* than the interest they are not to be deducted until the final balance is struck; if they were deducted, and the balance taken as the principal, it would increase the principal at the time of each payment, and as to this increased amount, interest would thereafter be cast upon interest.

Payments may be used to extinguish or lessen interest, but interest is never allowable upon payments. If so a party would be compelled to pay interest, because a part of that which was his due had been paid. To demonstrate, this: Suppose $50,000 upon interest at 6 per cent., and to have run 52 years, and that each year the amount of interest ($3,000) was paid; allow interest upon these payments, and they would not only pay the interest, but more than extinguish the whole $50,000 of principal, not a penny of which had ever been paid. The creditor would lose his debt and owe his debtor by this error of computing interest upon payments. The repeal is therefore not only without any *legal* effect, but it has no *moral* force. It is, and ought to be regarded a *nulity*, so far as it seeks to impair the rights of these claimants, as they stood at the time it was passed.

1. All the payments were less than the interest on the principal debt, up to the time they were paid.

Interest was not allowable upon these payments.

11 Vesey, jr. 93. 2 Wash C. C. 167. 1 John ch R (N.Y.) 13, 17. 17 Mass R 417, 3 Iowa, 76. 1 Peck 194. 3 Cow N.Y 87, & n A 2 P & H (Va) 663. 3 Cal R 234.

And this was the only objection ever made to this *award*.

2. As to allowing interest to the claimants. It was so decided in this case by Att'y Gen. Toucey, in 1849. And by the Secretary of War, under the Resolution of June 3, 1858. And Congress knowing this passed the Resolution of June 1, 1860, authorizing him to re-settle the claim and to make such "further allowances as in his opinion justice to the claimants shall require."

His must have been a singular sense of justice to allow a party in 1860, as a "full and fair indemnity" the mere value of property taken or destroyed in 1813, without interest. But that was a question for him to decide as he deemed just and equitable and his decision is final.

And even a mistake in allowing or disallowing interest does not render an award void, nor is it a ground for setting aside an award.

Gorden vs Masters, 3 Jones Eq N. C. 462.
Shephard vs Watson, 3 Cons (N. Y.) 166, 169.
Bailey vs Sechuere 1 Esp R 378. Kyd on Awards, 242.
17 How U. S. 349. 12 Wend 377. Ching vs Ching 6 Vesey 282.

FOURTH.

After the award had been made and published, any attempt by Congress to revoke the authority of the arbitrator, or to annul or recall what had been done, could not in any manner invalidate the award. It stands precisely as it would if the Resolution of March 2, 1861, had not been passed. And as that alone has prevented its payment, this Court should now direct it to be paid, as a valid debt due from the United States, established in the most solemn and conclusive manner known in legal proceedings—by a judge of the party's own choice.

FIFTH.

As the facts are stated, the Secretary of War made this award under, and in conformity to an existing law—after a full and fair hearing, and for no more than was justly due, after deducting all set-offs, credits, &c. And as all this stands *admitted*, there is but one decision this Court can properly make. And that is to order the payment of this award, with interest from Nov. 23, 1860. As payment since that time has been has been improperly prevented by the action of Congress.

And if this award is valid (as it is undoubtedly,) it is conclusive as to the amount due. And no question settled by the award can be again litigated before any other court or tribunal.

1 Days R 130. 132, &c. 17 How 344. 349.
Watson vs Aw 147, and see cases before cited.
2 Cow & Hill 1025, 1026. 1034, 1293, &c.

All which is respectfully submitted.

GORDON & GORDON, Admr's, &c.,
Claimants, Baltimore, Md.

HENRY BENNETT, Claimant's Att'y,
New Berlin, N. Y.

Supreme Court of the United States.

DECEMBER TERM, 1864.

In the Matter of Appeal from the Court of Claims.

BRIEF IN SUPPORT OF THE RIGHT.

THE ACTS ESTABLISHING THE COURT.

Congress, on the 24th of February, 1855, ch. 122, 10 *Stat. at Large*, 612, passed a Statute entitled, "An Act to establish a Court for the investigation of Claims against the United States." The first section establishes a Court of Claims, to consist of three Judges, to be appointed by the President, with the consent of the Senate, to hold office during good behavior. It provides, also, the said Court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied with the Government of the United States, which may be suggested to it by a petition filed therein; and also claims which may be referred to said Court by either House of Congress. The Act provides for the appointment of a Clerk, of a Solicitor, for the taking of testimony, and for a record of the proceedings; that the Judges shall take an oath to support the Constitution and faithfully to discharge the duties of the office. In this Act provision is made for reporting to Congress the result of their investigations, transmitting with their reports the testimony; and in cases in which they find in favor of the Claimant, to report a bill providing for the payment of the sum allowed. On the 3d of March, 1863, ch. 92, 12 *Stat. at Large*, 765, an additional Act was passed by which the number of the Judges was increased. It also provides, section 3, for set-offs, in favor of the Government, and for a final judgment thereon, (with a right of appeal,) which judgment may be certified to a District or Circuit Court of the United States, and shall thereupon become a judgment of the Court to which it may have been certified. The Act provides, section 4, for an

annual session, and authorizes the Court to prescribe rules and regulations; to punish for contempt. The Court may appoint Commissioners, and may generally exercise such powers as are necessary to carry out the powers granted. The Court shall have a seal. In the 5th section it is provided that either party may appeal to the Supreme Court of the United States from any *judgment or decree* which may hereafter be rendered in any case, by said Court, wherein the amount in controversy exceeds three thousand dollars, under such regulations as the said Supreme Court may direct. It provides also for an appeal, by the United States, in a certain class of cases, which may involve Constitutional or other important questions, although the amount in controversy may be less. Section 6 requires the Solicitor to represent the United States in the Court of Claims, and before the Supreme Court in cases of appeal. The 7th section provides that the judgments shall be paid, when in favor of the Claimant by the Secretary of the Treasury, out of any appropriation made for the payment of private claims. The 8th section provides for an examination of the Claimant upon oath, and by the 12th section he is required to verify his petition by a prescribed affidavit.

POSITIONS.

I. It is respectfully submitted that Congress may constitute a tribunal, inferior to the Supreme Court, in which the rights of the citizen against the Government may be judicially ascertained; and that the establishment of the Court of Claims was a constitutional exercise of authority. The Court will sustain it, unless restrained, in this respect, by some express provision of the Constitution, or by some intendment derived from the instrument which cannot be disregarded.

A. It is a familiar principle that every government may be sued with its consent. The petition of right as known to the law of England, by which the subject asserts his rights before some judicial tribunal, has existed from an early period. It is a most gracious prerogative of the Crown that justice and right be done to the subject.

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II. The provisions of the Constitution of the United States are broad enough to uphold the jurisdiction of the Court of Claims.

Article 1, *Sec.* 8. Congress shall have power to constitute tribunals inferior to the Supreme Court.

Article 3, *Sec.* 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may, from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior.

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, &c.—*to controversies to which the United States shall be a party.* In cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, *both as to law and fact*, with such exceptions and under such regulations as the Congress shall make.

Article 6. All debts contracted, and engagements entered into, before the adoption of this constitution shall be as valid against the United States, under this constitution, as under the confederation.

Amendments, *Article* 7. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law.

Article 11. The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state.

Stuart vs. *Laird*, 1 *Cranch*, 299. Congress has constitutional authority to establish, from time to time, such inferior tribunals as they may think proper, and to transfer a cause from one such tribunal to another. In this last particular, there are no words in the Constitution to prohibit or restrain the exercise of legislative power.

The objections which were relied upon in the case of "The United States vs. Ferreira, 13 How, 40, 46," do not apply to the Court of Claims. The Court as it is constituted under the Act of 1863, acts

judicially. A suit is instituted by petition which is required to be filed. A Solicitor is appointed who is authorized and required to represent and protect the interests of the United States. He is an officer of the Court, to some extent, and bound to take notice of its proceedings. The Court under its authority to establish rules and regulations, and to exercise such powers as are necessary to carry out the powers granted, may direct service of the petition to be made upon the Solicitor. The Court has a Clerk, is required to keep a record, has a seal, may take testimony, &c. In the case above cited, the Court recognize the right of Congress to establish a Court, to regulate its proceedings and limit its power, and to subject its decisions to the control of an appellate tribunal, if it deemed it advisable to do so.

Fletcher vs. *Peck*, 6 *Cranch*, 87. Whether an Act is void, for repugnancy to the Constitution is a question of delicacy. It is not on slight implication that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void.

A. The judicial power of the United States extends, as already shown, to all cases arising under the Constitution, the laws of the United States; to controversies to which the United States shall be a party.

B. The liabilities of the United States to the citizen, in certain cases, and in a certain mode, have been submitted to judicial investigation before the Circuit Courts, and by appeal to this Court. No constitutional objection is perceived, to the power of Congress to extend this jurisdiction, or to provide for Courts inferior to the Supreme Court, in which the citizen may set up his contracts with the Government, and his rights subsisting under the laws, or contracts of the United States, and refer them to judicial decision.

1 *Stat. at Large*, 512, *March* 3, 1797, *ch.* 20, *sec.* 3 *and* 4. By this Statute a citizen sued by the United States, may set up, in the mode prescribed, his claims against the United States, and have them passed upon by the Circuit Court, in the first instance, and by this Court upon writ of error.

Gratiot vs. *the United States*, 4 *How.* 80.

C. The cases in which it has been holden that Courts within the several states, the Judges of which are appointed for a limited number of years, and not during good behavior, are not constitutional Courts, have no application to the Court of Claims. The same observation is true of the cases in which it has been held that the authority of territorial Courts is determined by the admission of the territory as a state.

Benner vs. *Porter*, 9 *How.* 235, 242–3.
Forsyth vs. *the United States*, 9 *How.* 571.
The American Ins. Co., vs. *Canter*, 1 *Pet.* 545.

III. The Court of Claims is authorized by the Act of 1863, to exercise such powers as are necessary to carry out the powers granted. Assume that this does not empower the Court, as a Court of common law, to convene a jury; it is submitted the Court may well exercise the jurisdiction conferred, without the intervention of a jury. The Court is not designated as a Court of common law, or as a Court of Equity. It resembles in its construction the latter, more than it does the former, although it must undoubtedly be called to adjudicate upon legal, so well as equitable rights.

Parsons vs. *Bedford*, 3 *Pet.* 445. The amendment of the Constitution by which the trial by jury is secured, may, in a just sense, be well construed to embrace all suits not of equity or admiralty jurisdiction.

Webster vs. *Reid*, 11 *How.* 437. The law directed that the Court should decide without the intervention of a jury to determine matters of fact; this was inconsistent with the Constitution of the United States.

A. The right of trial by jury is a personal privilege of the citizen, which he may waive. The United States, by the action of Congress, which, in this respect, represents the sovereignty, may well submit their rights to judicial tribunals, without the intervention of a jury, so far as those rights depend upon its contracts with individuals rightfully made.

Parsons vs. *Armor & Al.* 3 *Pet.* 413. The parties waived trial by jury, and the Court entertained jurisdiction.

Stimpson vs. *Balti. & Susque. Railroad*, 10 *How.* 329, 345, 346. The practice of bringing cases up to this Court upon an agreed statement of facts has been sanctioned, and is now pronounced to be correct.

B. The award of an arbitrator, made a rule of Court, may be the foundation of a legal judgment.

C. In Courts of common law it is competent to permit a demurrer to evidence, by which the cause is withdrawn from the consideration of the jury.

IV. The judgment of the Court of Claims, regularly pronounced, binds the right, and is conclusive as a decree or judgment, although the party claimant, if successful, must apply to the Secretary of the Treasury for payment, who is to pay from appropriations made therefor. This provision was made to protect the dignity of the Government, and to prevent interference with its financial operations; it cannot be urged as a ground for holding the Court unconstitutional.

A. The Court entertain suits instituted in the name of the United States, although it cannot award cost against them, if the Defendant prevails. So under the Act of 1797, by which set-offs are allowed to be put in proof against the United States, the Court do not award judgment and execution in favor of the Defendant for any balance found due to him from the Government. In England, the judgment upon a petition of right against the Crown for land, executes itself, without process of execution.

Manning Exchequer Practice, Revenue Branch, 2*d Edi.* 84. Where a right is sought to be established against the Crown itself, it would be absurd as well as indecent to adopt the mandatory forms of the common law process. 85. Where money is recovered against the Crown, the writ of execution for the subject is directed to the Treasurer and Chamberlain, who appear to be personally responsible to the Plaintiff if they do not appropriate the first moneys that come to their hands toward satisfying his demand.

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3 *Stat. at Large*, 691, 92, *ch.* 96, *sec.* 6-7-8-9, *May* 7, 1822. Congress authorized suit, in the Circuit Court of the United States for the District of Columbia, against the United States in certain cases, by a proceeding in the nature of a petition of right, giving the right of appeal to the Supreme Court. It did not provide for an execution, although it declared the judgment should bind the right.

Van Ness vs. *City of Washington and the United States*, 4 *Peters* 232, 276, 277.

The United States vs. *Marvin*, 3 *How.* 622-23. The Statute of May 26, 1824, 4 Stat. at Large, 52, 54, ch. 173, sec. 6, referred to in the case cited gives the Claimant a copy of the decree, with which he is to obtain his right, without the intervention of the Court.

V. The Statute of 1863, in express terms, gives a right of appeal to this Court, where the sum in dispute exceeds three thousand dollars; to the Government where the sum is less, a right of appeal is given in cases which may involve constitutional questions, or matters of grave importance to the principal officers of the executive department. The subject matters submitted to the Court of Claims are peculiarly fit and appropriate for judicial cognizance. The exercise of the jurisdiction conferred is no less important to the Government than to the Claimant.

Bank of United States vs. *Deveaux*, 5 *Cranch*, 61. The duties of this Court to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The Constitution, therefore, and the law are to be expounded without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws. A Constitution from its nature deals in generals not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles.

VI. The Constitution, article 3, section 2, says the Supreme Court, (in the cases designated,) shall have appellate jurisdiction, *both as to law and fact*, with such exceptions, and under such regulations as the Congress shall make. The Statute constituting the Court of Claims, Act of 1863, gives the right of appeal in general terms, making no exceptions. It is submitted therefore that an appeal brings up both the law and the fact.

A. The 5th section of the Act of 1863, which gives the appeal, says it may be taken from any judgment *or decree*. The last term is more appropriately applied to a Court of Equity, which may proceed without a jury, and in which, in cases of appeal, the facts so well as the law go up.

B. The Government, in submitting its rights to judicial investigation, in competition with the citizen, may well require, as a means of protection, the judgment of its highest judicial tribunal, both upon the facts and the law applicable thereto, and by providing, in general terms, for an appeal, it is respectfully submitted, has provided therefor.

C. The Statute has not provided for a writ of error, a mode peculiar to a Court of exclusive common law jurisdiction, and which has acquired certain known qualities. This omission favors the position that the right of appeal was intended to take up both the law and the facts.

D. The Act of 1855 required the Court of Claims to accompany their reports to Congress with the testimony. It may, therefore, be urged that Congress, by an enlargement of the powers of the Court, by substantially changing its character, and by giving, in general terms, an appeal to the Supreme Court, intended that the facts and the law should go up.

VII. If the views presented are correct, the cases in which the Court have decided that a writ of error takes up only the law, are not applicable.

VIII. It is respectfully submitted that the Court of Claims, as constituted by the Act of 1863, is within the constitutional power of Congress; that it will be sustained and the right of appeal established, under such regulations as the Court may be pleased to make.

C. B. GOODRICH.

J. H. Eastburn's Press—14 State Street, Boston.

Court of Claims

Right of Appeal -

Brief of C B Goodrich

Court of Claims — Right of Appeal —

~~Execution of its decrees —~~

~~cases cited by C. B. Goodrich —~~

Execution of its decrees —

cases & statutes cited by C. B. Goodrich

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Court of Claims -

Right of appeal -

cases & Statutes cited by

C. B. Goodrich

Supreme Court of the United States.

DECEMBER TERM, 1864.

In the Matter of Appeal from the Court of Claims.

SUPPLEMENTARY BRIEF IN SUPPORT OF THE RIGHT.

Authorities to be cited under the first position of the Original Brief.

3 *Blackstone Com. ch.* 17, *pp.* 254, 6–7. "I proceed to inquire into the mode of redressing those injuries to which the Crown itself is a party; which injuries are either where the Crown is the aggressor, *and which therefore cannot without a solecism admit of the same kind of remedy;* or else is the sufferer, and which are then usually remedied by peculiar forms of process appropriated to the royal prerogative." In considering the manner of redressing those wrongs or injuries which a subject may suffer from the Crown the author says, "that in the first place whatever may be amiss in the conduct of public officers is not chargeable personally on the King; and secondly, *that the prerogative of the Crown extends not to do any injury;* for being created for the benefit of the people, it cannot be exerted to their prejudice. Whenever therefore it happens that by misinformation or inadvertence the Crown hath been induced to invade the private rights of any of its subjects, though no action will lie against the Sovereign, (for who shall command the King,) yet the law hath furnished the subject with a decent and respectful mode of removing that invasion by informing the King of the true state of the matter in dispute, and as it presumes that to *know of* any injury and *redress* it are inseparable in the royal breast, it then issues as of course, in the King's own name, his orders to his judges to do justice to the party aggrieved. *Page* 256.—The common law methods of obtaining possession or restitution from the Crown, of either

real or personal property are, 1, by the petition of right. 2, by manifestation or plea of right, both of which may be preferred or prosecuted *either in the Chancery or Exchequer*. *Page* 257.—The judgment is *quod manus domini regis amoveantur et possessio restituatur peteuti salvo jure domini regis;* which last clause is always added to judgments against the King to whom no laches is imputed—and by such judgment the Crown is instantly out of possession; so that there needs not the indecent interposition of his own officers to transfer the seisin from the King to the party aggrieved.

Manning Exchequer Practice, 84, 85. By the law of England no personal wrong can, for obvious reasons, be imputed to the Sovereign. But, when the property of the subject is invaded or withheld, the prerogative does not prevent the injured party from obtaining restitution or payment. Where, however, a right is sought to be established against the Crown itself, it would be absurd, as well as indecent, to adopt the mandatory forms of common process. The course therefore prescribed is, to address a *petition* to the King in one of his Courts of Record, praying that the conflicting claims of the Crown and the petitioner may be duly examined. As the prayer of this petition is grantable, *ex debito justiciæ*, it is called a petition of right, and is in the nature of an action against the King, or of a writ of right for the party, though chattels real, or personal debts, or unliquidated damages, may be recovered under it. *Page* 85.—Where money is recovered against the Crown, the writ of execution for the subject is directed to the Treasurer and Chamberlain, who appear to be personally responsible to the Plaintiff, if they do not appropriate the first moneys that come to their hands towards satisfying his demand. In this action the Plaintiff, or as he is more frequently called the Suppliant, may be nonsuited, although the Crown press for a verdict, and he may afterwards have a new petition.

The Baron de Bode, 2 *Phillips*, *Ch. Rep.* 85, 7–8. "Now it is supposed, and there seems very good reason for the supposition, that this proceeding by petition of right was adopted on account of the inconsistency which there would be in having a suit instituted against the Crown by the Crown's own writ, and the obvious impropriety of having the Crown brought into litigation with the subject without its own immediate consent.

The case of the Baron de Bode, came before the Court of Exchequer Chamber, by Writ of Error to the Queen's Bench. 13 *Adol. & Ellis, N. S., pp.* 364–380. In which it was held, "Error on a judgment for the Crown, in a petition of right may be brought in the Exchequer Chamber." The Attorney General objected to the writ because no *scire facias*, to hear an assignment of errors could be awarded against the Crown. The Court, in discussing this objection, say "It appears to be clear that such a writ of scire facias has never been deemed to be necessary as against the King, because the King is always present in court." The Counsel for the Crown was ordered to join in error within twenty-four hours.

Sir Henry Nevil's case, Plowden 377, 82. The petition in this case was presented, in the first instance, to the Court of Exchequer, and not to the King. It shows the form of execution or notice which, after judgment, was issued to the Treasurer and Chamberlain. See also the case of *Sir Thomas Roth, same Book, pp.* 452–58.

Exparte Pering, 5 *Dowling Practice Cases* 750, 52. A petition of right was addressed to the King, *in his Court of Exchequer*. The King indorsed it, "Let right be done." Held that the Court of Exchequer had no jurisdiction to adjudicate upon it. "Where a petition of right is indorsed generally, *it goes to the Court of Chancery;* and in order to give the other courts jurisdiction, there must be a special indorsement commanding right to be done in the particular court." *Page* 752, Lord Abinger says "The King may refer it to any of the courts; for instance, upon a question touching real estate, to the Common Pleas, upon a matter relating to the revenue, to this court; or upon a point of criminal law, to the King's Bench. The presenting the petition to the King in his Court of Exchequer does not give the court any jurisdiction.

It is submitted as a result of the authorities applicable to the subject, that a suit against the Crown is by petition addressed to the Sovereign, who indorses upon it, "Let right be done to the party." Motion is then made before the Lord Chancellor, upon notice to the Attorney General, the Law Officer of the Government, for direction as to the court in which the matter shall be heard. It is referred to some one of the courts of law, or chancery. It may go by Writ of Error to the Exchequer Chamber, and to the House of Lords, (see Baron de Bode,

3 House of Lords Cases, 449.) After the indorsement of the Sovereign, that right be done to the party, no process or writ, original or final, is issued against the Sovereign. The judgment binds the right, and in many cases executes itself; in others, in which the decree requires the payment of money it is executed by the servants of the Crown. Notice to the Treasurer and to the Lord Chamberlain is regarded as an execution, because from the character of the proceeding, and of the party to be affected no other can be issued. The Sovereign does not issue, by means of his courts a writ of execution commanding himself to pay.

Third and Fourth Positions in Original Brief.

The Act of 1863, March 3, ch. 92, 12 Stat. at Large, 766, section 7th, provides that in all cases of final judgment in favor of the Claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the Clerk of said Court of Claims, and signed by the Chief Justice, or in his absence by the presiding Judge of said court.

This copy is equivalent to an execution, and the law provides for the payment of the decree. This is the only execution, when the judgment is against the United States which the character of the party will permit. If the claim is dismissed, unless it be without prejudice, by reason of some formal defect, the dismissal binds the right and executes itself. If a balance, by reason of set-off, is found due from the Claimant to the United States, the Statute provides, *section* 3, *page* 765, it (the Court) shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases herein provided for. Any transcript of such judgment filed in the Clerk's office of any District or Circuit Court of the United States, shall be entered upon the records of the same, and shall ipso facto become and be a judgment of such District or Circuit Court, and shall be enforced in like manner as other judgments therein.

A petition filed in the Court of Claims must be regarded as equivalent to a petition of right, in the Courts of England, after the indorsement thereon by the Sovereign, that right be done to the party. As

already shown, from the cases cited supra, the petition goes to the Chancery jurisdiction for trial, unless by a special order of the Lord Chancellor, it is sent to a court of law. The Act establishing the Court of Claims, seems to have adopted very closely the English course of proceeding. The prominent differences are in the provisions for a set-off and judgment for a balance against the Claimant, which is not found in the English course of proceeding, and for the establishment of a distinct and independent tribunal, in which Claimants shall prefer their suits, with a right of appeal to the highest judicial tribunal of the country. I have not discovered any other material differences, in the two systems. The effect of the judgments which may be pronounced and the mode of execution against the Government, in every substantial particular are the same.

If the Court of Claims, as now constituted, cannot be sustained as a constitutional tribunal of the United States, the provision of the Constitution which declares that the judicial power of the United States shall extend to controversies to which the United States shall be a party, becomes illusory and inoperative. The number and character of courts inferior to the Supreme Court, and the extent of their jurisdiction, is peculiarly a matter for the determination of Congress, and their action will be upheld in this respect, unless its inconsistency with the Constitution is clearly manifest. It is submitted, the Constitution contains no provision which may induce its destruction or which can defeat the trusts or duties confided to the Government, among which the private rights of the citizen in competition with the Government, are not the least important.

It is a familiar doctrine that a Court of Equity will not proceed to render a judgment which it cannot execute, because a judgment which cannot be executed would be useless. Notwithstanding this oft repeated position, the English Courts of Chancery proceed to hear petitions of right and to render judgment therein, which are executed by the Sovereign. The true doctrine, in this respect, is that the Court will not proceed to render a judgment for the execution of which, the Sovereignty, of which the court constitutes a part, has not provided in a manner satisfactory to itself.

In respect to the decrees which may be passed by the Court of Claims against the United States, Congress has made provision for their execution, and it is respectfully submitted, that it cannot be judicially said that the provision is insufficient or that the legislative department of the Government will not provide the Secretary of the Treasury with the means of satisfying such decrees, and as a consequence that the Court of Claims cannot be regarded as a constitutional court of the United States.

C. B. GOODRICH.

J. H. Eastburn's Press—14 State Street, Boston.

COURT OF CLAIMS.

THE RIGHT OF APPEAL.

SUPPLEMENTARY BRIEF BY

C. B. GOODRICH.

15 Ord
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SUPREME COURT OF UNITED STATES.

DAVID GORDON AND SUSAN E. GORDON,
Administrators of Geo. Fisher, deceased,

against

THE UNITED STATES.

POINTS.

As to the *jurisdiction* of the *Supreme Court*, in this case—
An *appeal* from the *Court of Claims*.

I.

"*The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.* The judges both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

Constitution U. S., Art. 3, §1.

"The Congress shall have power to *constitute tribunals inferior* to the Supreme Court."

Constitution U. S., Art. 1, §8, *Subdivision* 9.

"The judicial power shall extend to all cases of *law* and *equity* arising, (1,) under the Constitution; (2,) *the laws of the United States;* (3,) and treaties made, or which and shall be made under their authority; (4,) to all cases affecting embassadors or other public ministers or consuls; (5,) to all cases of admiralty and maritime jurisdiction; (6,) *to all controversies to which the United States shall be a party;* (7,) to controversies between two or more States; (8,) between a State and citizens of another State; (9,) between citizens of different States; (10,) between citizens of the same State

claiming lands under grants of different States; and between a State or the citizens thereof and foreign States, citizens or subjects."

Constitution U. S., Art. 3, §2, *Subdivision* 1.

"In all cases affecting embassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have *original jurisdiction.*"

"In all other cases before mentioned the *Supreme Court* shall have *appellate jurisdiction*, both as to *law* and *fact*, *with such exceptions and under such regulations as the Congress shall make.*"

Constitution U. S., Art. 3, §2, *Subdivision* 2.

The Court of Claims is certainly a *court* or *tribunal* inferior to the Supreme Court, constituted by Congress.

See act establishing Court of Claims, 10 *Stat.*, 612, *and act amending same*, 12 *Stat.*, 765.

The Supreme Court have *appellate jurisdiction* in these cases, both as to the *law* and the *fact under the Constitution and the laws and regulations made by Congress.*

12 *Stat., p.* 766, §5, *Constitution, Art.* 3, §2.

They are embraced in the express terms of the Constitution, and arise, (1,) *under the Constitution*; (2,) *under the laws of the United States;* (3,) *and they are controversies in which the United States are a party;* (4,) *and they are appeals authorized by the regulations made by Congress.*

See authorities above cited, and 2 *Story on the Constitution*, §1593, 1595, 1597, 1638, *and* §1642, 1674 *to* 1679.

Chief Justice Marshall, in an unanswerable *opinion*, after considering the whole question, decides that the Supreme Court is "invested with *appellate jurisdiction* in *all* cases arising under the Constitution and *the laws of the United States.* We find no exception to this grant, and we cannot insert one."

Cohens *vs.* Virginia, 6 *Wheaton*, 264, 392 *to* 396, 404–5, *and* 416, and cases cited.

"The jurisdiction of the United States courts is properly commensurate with every right and duty created, declared

or necessarily implied by and under the Constitution and *laws of the United States.*"

Irvine *vs.* Marshall, J. Daniels, 20 *How. R.* 558, 564; *Lytle* vs. *Arkansas*, 22 *How.* 202 *and* 203, and cases cited. 1. *Black. R.* 195, 179; 2 *Story on Con.* §1702, *to* 1722, *and cases cited and notes.*

"There can be no doubt that Congress may create a succession of *inferior tribunals* in each of which it may vest *appellate* as well as *original jurisdiction.* The judicial power is delegated by the Constitution in the most general terms, and may, therefore, be exercised by Congress in *every variety of form* of appellate or original jurisdiction."

Martin vs. *Hunter*, 1 *Wheaton R.* 304 *and* 537, *&c.*; *Osborn* vs. *U. S. Bank*, 9 *Wheaton*, 738, 820, 821, *&c.*; *Noonan* vs. *Lee*, 2 *Black. R.* 500 *and* 509. 2 *Story on Constitution*, §1701, 1702, 1704,–5,–6,–7, *and note, and to* §1727, 1731, 1776.

II.

The *appellate jurisdiction* of this court extends to *all cases* enumerated in the Constitution, "with such exceptions and under such regulations as Congress may make." Congress could not by any law deprive this court of the jurisdiction given to it by the Constitution. It could only make such exceptions and regulations as might be deemed expedient for the exercise of its jurisdiction.

Constitution, *Art.* 1, §8, *and Art.* 3, §2.

And even had Congress neglected to pass any law as to these appeals, this court could still exercise its appellate jurisdiction, given by the Constitution. Or had Congress constituted a *tribunal* to decide these *cases*, and provided in the act that it should not be a *court*, and its decisions should not be *judicial*, it would not alter the Constitution, or defeat or impair the jurisdiction of this court.

Martin vs. *Hunter*, 1 *Wheaton*, 337, 339.

That jurisdiction is created by the Constitution, and depends upon the kind of *cases* decided by the inferior *tribunal* established by Congress, and not upon the organization

of such tribunal or its mode of proceeding. These are matters left wholly to the discretion of Congress. *But Congress could not constitute any tribunal to decide any of the cases enumerated, to which, under the Constitution, the appellate jurisdiction of this court would not extend and apply.*

"The words are, the *judicial power* (which includes the appellate power) shall extend to *all cases*, &c., and 'in *all other cases* before enumerated, the Supreme Court shall have appellate jurisdiction.' It is the *case*, then, and not the *court* that gives the *jurisdiction.* If the *judicial power* extends to the *case* it will be in vain to look in the letter of the Constitution for any qualification as to the *tribunal* where it depends."

Martin vs. *Hunter*, 1 *Wheaton*, 337, 339.

One class of *cases* enumerated, and to which this appellate jurisdiction extends, is, "*to all controversies to which the United States shall be a party*," no matter by what tribunal such a *controversy* is decided, this court has over the *case* a supervisory and appellate jurisdiction. And no matter whether the *controversy* is termed a *suit* or not, if the United States is a party, this court has appellate jurisdiction. In effect the Constitution declares the decision of such a *case* by any tribunal a *judicial* decision, and the right to review all such decisions is made a part of the *judicial power* expressly given to this court. Actions can only be brought against the United States, under the *laws*, and in the *courts* of the United States, and in all *cases* under this *law* in the Court of Claims, the *United States is a party to the record*, and this court has therefore *appellate jurisdiction* by the express terms of the Constitution.

Another class of cases enumerated, and to which this *judicial power* extends is, *cases* arising "*under the Constitution and laws of the United States.*"

"If in any controversy in a court the cause should depend on the validity of a law, it would be a *case* arising under the Constitution, to which the *judicial power* of the United States would extend."

Cohens vs. *Virginia*, 6 *Wheaton*, 405, 419.

Here the only question in this case is the validity of the

joint resolution of Congress of March 2, 1861, and consequently this court has appellate jurisdiction by the express terms of the Constitution.

But Congress, "ordained and established" the *Court of Claims*, giving to it all the necessary officers and authority as a *court*, with judges appointed under the Constitution, clothed with authority to hear and determine certain *cases*, to take evidence on both sides, and to allow the claims and counter claims of both parties, and to render judgment for either party. All its proceedings are as a *court* and *judicial* in their character, as much as they can be in any case in any court, in an action arising upon contract, express or implied. And in no other court can the United States be made a party.

Congress excepted from appeal all cases less in amount than $3,000, an exception including a large class of cases, and authorized this court to adopt its own "regulations" as to these appeals—treating this Court with that respect due to a co-ordinate branch of the Government.

10 *Statutes*, 612; 12 *Statutes*, 765, 766, §5.

Congress has unlimited power as to the kind of *inferior courts* it will constitute, the jurisdiction it will confer, and the mode of proceeding it will authorize. The *Court of Claims* is such an inferior court or tribunal as Congress had authority to constitute. The acts constituting that court are in accordance with the Constitution, and this *court* should not disclaim or renounce a jurisdiction imposed by the Constitution, and deemed so important to the people and the Government.

III.

As the Court of Claims is an inferior court or tribunal constituted by Congress to hear and determine a certain class of cases, under the Constitution and *laws of the United States*, it has no common law jurisdiction, but only the jurisdiction given to it by statute. That law also gives an *appeal* to this court, without which the Court of Claims would be a most unsatisfactory and arbitrary tribunal, and such as Congress would not have established. It certainly would have the power of doing great injustice in cases involving private

rights, to claimants or to the Government, without redress by either party, should appeal from it be denied.

The United States could by law consent to be sued and have claims against them passed upon by a *court* having some regard to law and evidence, and some uniformity of decision rather than to be decided by a mere *committee*, changing every Congress, and where the claimant's chance of success depended mainly upon his importunity and perseverance, rather than upon the real merits of his case. But this was a question for Congress, and Congress has decided to organize a court and allow the United States to be sued, giving an *appeal* to this court to either party when the claim was over $3,000.

2 *Story on the Const.*, §1707 *to* 1709; 6 Wheaton, 264 *and* 380.

This law of Congress is clearly *constitutional* as to the *tribunal created*, and as to the *appeals authorized*. It is within the authority given by the Constitution to Congress.

Congress had authority to constitute the Court of Claims and authorize appeals to this Court.

IV.

As to the objection that these appeals require an examination of the *facts* as well as of the *law*, and would occupy too much of the time of this court, this is a question of expediency, and not of constitutionality. This is so in all equity cases, and in nearly all appeals under special acts. The Constitution gives this Court *appellate jurisdiction* both as to the *law* and the *fact*.

Constitution, Art. 3, §2; *Story on the Const.*, §1760 *to* 1768.

But this act provides that these appeals are to be heard "under such regulations as the Supreme Court may direct," (12 Statutes, 766, §5,) and this court might by rule require the Court of Claims to state the facts as found by it, and thus ordinarily lessen the labor of reviewing the facts, or make any other regulation deemed proper. That is a matter expressly left to this Court by Congress.

2 *Story on the Const.*, §1758; 1 Wheaton, 1, 51.

In this case there are no questions of fact to be considered, *and only one question of law*, and that is one upon which the appellant is clearly entitled to a reversal of the decision of the Court of Claims.

V.

Briefly, the question in this case is—Can the repeal of a law giving authority to an arbitrator or commissioner to adjudicate upon and determine the amount of a private claim, after he has fully executed the authority, and made and published his award, recall what has been done under the law, while it was in force, and operate backwards to annul the award previously made? And it arises under this state of facts:

Congress, by a joint resolution, passed June 1, 1860, authorized and required the Secretary of War to examine the claim made in this case, (for property destroyed by the troops of the United States,) "*to give effect to all the evidence on file*," and make such "*further allowances as in his opinion justice to the claimants required.*"

As required, he executed this law, and duly made and published his award, in which he says he found, upon careful examination of the evidence, *substantial* reason for the assumption of *Congress*, "*that full effect had not been given to all the evidence on file*," and that the estimate of the value of the property "*was much less than the evidence required.*"

He accordingly made a further allowance, adopting, in every instance, the *lowest estimate according to the evidence*, and allowing only about one-half of what was claimed, and deducted all former allowances. His award was duly made and published November 23, 1860.

Afterwards, on March 2, 1861, (between three and four months after,) Congress, by joint resolution, repealed the joint resolution of June 1, 1860, and declared all proceedings under it null and void. But for this repeal the award would have been paid.

1. *Are awards and judgments, settling private rights, fairly obtained under existing laws, dependent upon legislative caprice?*

2. *Can the repeal of a law impair the validity of an award or judgment previously obtained under it?*

3. *Can Congress deprive a citizen of his property without his consent, independent of any constitutional provision?*

4. *And is not an award or judgment belonging to a party as much property as a mortgage on a farm?*

5. *And does not the Constitution provide that no person shall be deprived of his property except by due process of law, that is, by judicial proceedings in a court of justice, and except when it is taken for public use and compensation made?*

6. *Are vested rights acquired under a law divested and obliterated by its repeal?*

7. *After an arbitrator has made and published his award, can his authority be revoked?*

8. *After a special authority conferred by law has been completely executed, is it not exhausted and ended, and is there anything then remaining in force, to be affected by a repeal?*

9. *And is not the validity of the award made in this case, to be determined by the law as it stood at the time it was made, or can the award be cancelled and annulled by subsequent legislation.*

All these questions must be answered against us, and against the well settled rules of law, or it must be conceded this repealing resolution and the decision sustaining it, and giving it a *retrospective* operation, cannot be upheld, but are in direct violation of the Constitution and of natural right.

6 *Cranch*, 87, 135, 18 *How.* 421, 431; 7 *John*, *N. Y. R.* 477; 10 *N. Y. Rep.* 393; 10 *Barb. Rep. N. Y.* 225, 244; 4 *Barb. N. Y. R.* 60, 70, 75, *amendments of Constitution*, §5; *Smith on the Construction of Stat.*, §760 *to* 775. *And see cases cited in former brief.*

The attempt by Congress to pronounce a *judgment*, (in the repealing resolution itself,) as to the effect of the repeal, cannot enlarge its operation, as Congress has only legislative and not *judicial* authority.

The decision made by the Secretary was an *award.*

United States vs. *Ferreia*, 13 *How.* 40 *and* 47.

And as no appeal was provided for, it was final.

6 *Metcalf*, 131, 165, *and see former brief.*

Congress authorized the Secretary to allow such further sum as in *his opinion justice required. This authority made his opinion the law of the case*, and if fairly exercised (which is not questioned) it is conclusive both as to the *law* and the *facts.*

Burchell vs. *Marsh*, 17 *How. R.* 344, 349.

A majority of the Court of Claims held this award *became null and void solely* because the law under which it was submitted to the Secretary to determine the amount due, and after he had decided it, and made his award, had been repealed. When the award was made, the authority of the Secretary was at an end. The resolution of June 1, 1860, was completely *executed*, and then there remained nothing to repeal.

Bayne vs. *Morris*, 1 *Wallace's R.* 97 *and* 99.

Clearly the decision of the majority of the Court of Claims should be reversed. And we *protest* against being denied a right of appeal in such a case, because it would be a *judicial* repeal of the law allowing appeals, and because in this case it would amount to a *denial* of justice.

HENRY BENNETT,
Counsel for Gordon and Wife.

N. B.—This question arises on *demurrer* to the *amended petition.* The *amended petition* will be found in the return made to this appeal, *commencing at page* 14, and *extending to page* 26. The *demurrer on page* 27, and the *decision of the court* from *page* 28 *to* 32. *The ground of decision is stated at page* 32.

SUPREME COURT OF UNITED STATES.

DAVID GORDON AND SUSAN E. GORDON,
Administrators of Geo. Fisher, deceased,

against

THE UNITED STATES.
(No. 160.)

The order of the Court directs the question of the jurisdiction of the Supreme Court to hear and decide upon appeals from the Court of Claims, to be argued.

The question contemplated is not whether an appeal lies in *this* case, but whether an appeal lies in any case from the Court of Claims.

That raises the question of the nature of the jurisdiction of the Court of Claims.

If it be a judicial tribunal, and the matters submitted to it of judicial cognizance, to be considered under judicial forms of proceedings, then an appeal lies, for the act of Congress gives it.

If it be merely administrative in its functions, then through judgment and discretion be involved in performing its duties, no appeal will lie to the Supreme Court.

We maintain

1. That the act of Congress of March 3, 1863, made the Court of Claims a judicial tribunal.

2. That the matters submitted to its decision are of judicial cognizance, to be considered and decided under judicial forms of proceeding.

2 *Dallas*, 409, 413.

3. That its judgments or decrees are binding and conclusive between the parties, and not subject to review by any administrative or political authority, but by the supreme judicial tribunal only.

1 *Stat.*, 243, 245; 2 *Dallas*, 409, 413; 13 *How.*, 40, 45.

4. That the jurisdiction conferred on the Court of Claims is not of new creation, but either in whole or in part, was possessed by the ordinary judicial tribunals of England, was in part of common law origin, and has been by various acts of Congress conferred on the Circuit and District Courts of the United States in particular cases or in large classes of cases, and recognized as fit subject of judicial cognizance by the Supreme Court of the United States.

The Bankers case, 11 *State Trials*, 149, 150, 150, 159, 160, 161, 162; *Chitty on Prerogative*, 340, 350; 4 *Stat.*, 52, *Act* 26 *May*, 1824; 4 *Stat.*, 284, *Act* 23 *May*, 1828; 4 *Sta.*, 405, *Act* 26 *May*, 1830; 9 *Stat.*, 631, *Act* 3 *March*, 1851; *U. S.* vs. *Clark*, 8 *Peters*, 444; *U. S.* vs. *Huerlas* 8 *Peters*, 487; 8 *Pet.*, 190, 191; *Benner* vs. *Porter*, 9 *How.*, 235, 240; *U. S.* vs. *Fossall*, 21 *How.*, 446,–7, 450, 451; *U. S.* vs. *Covelland*, 1 *Black.*, 339, 341,–2; *U. S.* vs. *Nye*, 21 *How.*, 408 *&c.*; *U. S.* vs. *Choboya*, 2 *Black.*, 593; 1 *Pet.*, 193.

See also U. S. vs. *Canter*, 1 *Pet.*, 541, 544, 545,–6; *Curtis A. T. P. Co.*, 6 *Cranch*, 233; 3 *Pet.*, 413, 425; *Parsons* vs. *Bradford*, 3 *Pet.*, 447; *Panel* vs. *Ellis*, 16 *Pet.*, 453,–4; *U. S.* vs. *King*, 7 *How.*, 833, 844,–5; *Bond* vs. *Brown*, 12 *How.*, 254; *Cohen* vs. *Va.*, 6 *Wheat.*, 411, 412; 18 *How.*, 283; 14 *Pet.*, 95; 5 *Pet.*, 110.

6 *Cranch*, 280, 304, 807; *Exparte Watkins*, 3 *Pet.*, 203. 205; *Kemp* vs. *Kennedy*, 5 *Cranch*, 173; 5 *How.*, 28; 15 *Pet.*, 392; 9 *How.*, 447; 3 *How.*, 120; 3 *Wheat.*, 181; 4 *Pet.*, 282; 3 *Stat.*, 691.

H. WINTER DAVIS,
Of Counsel for Appellants.

United States, and that under it they are entitled to interest as damages for the detention of said property during the time of its detention, and until payment is made therefor. And said Second Auditor, after said decision in pursuance thereof, allowed interest upon the amount first allowed by him from the date of the taking or destruction of said property, up to 1832, amounting to $10,004 89.

These allowances were all under the original act of April 12, 1848, and were paid to the claimants; they embraced one-half the value of the property as estimated by said Auditor, and which he con-
21 sidered as sufficiently proved, after rejecting a part of the proof and depositions as not properly authenticated, and the interest thereon at six per cent. per annum from the time of its taking or destruction up to the date of said first allowance.

Your petitioners further state that the legal representative of George Fisher, deceased, again applied to Congress for relief from the ruling of said Auditor, and on the 22d December, 1854, Congress passed another act for their relief, of which the following is a copy, viz:

AN ACT supplemental to an act therein mentioned.

Be it enacted, &c., That it shall be the duty of the Second Auditor of the Treasury, under the provisions of the act of Congress for the relief of the legal representatives of George Fisher, deceased, approved April 12, 1848, to re-examine the said case, and to allow the claimants the benefit of the testimony heretofore marked "rejected for the want of authentication:" *Provided*, The same is now legally authenticated by the executive of Alabama; the adjustment to be made in strict accordance with the act herein above referred to, and to which this act is barely supplemental.

Approved, December 22, 1854.

[*Vol. U. S.* 10, *Statutes*, 835.

Your petitioners further state that said act was passed upon the application and for the relief of the legal representatives of George Fisher, deceased, and was duly accepted by them.

Your petitioners further state that afterwards, on the 3d of June, 1858, Congress passed a joint resolution transferring to the Secretary of War the duties required to be performed by the Second Auditor under the acts before mentioned, of which the following is a copy, viz:

JOINT RESOLUTION devolving upon the Secretary of War the execution of the act of Congress entitled "An act supplemental to an act therein mentioned," approved December 22, 1854.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the duties imposed or required to be performed by the act of Congress entitled "An act supplemental to an act therein mentioned," approved December twenty-two, eighteen hundred and fifty-four, including the act to which it is supplementary, be, and the same are hereby, transferred

to the Secretary of War, who shall proceed *de novo* to execute the same in their plain and obvious meaning: *Provided, nevertheless,* That from any amount which may be found justly and equitably due to the legal representatives of George Fisher, deceased, there shall be deducted all sums which may have been heretofore allowed and paid by the United States.

Approved, June 3, 1858.

[11 *Statutes,* 553.

Your petitioners further state that the said joint resolution was passed upon the application and for the relief of the legal representatives of Geo. Fisher, deceased, and was duly accepted by them; and that all of said acts and resolutions remain unrepealed and in full force. And at their request, under said resolution and the two acts before mentioned, the Secretary of War proceeded to examine the case and estimate the value of the property taken or destroyed, and estimated the same at a sum only $158 higher than the valuation before placed upon it by the said Auditor; and it appearing
22 by the evidence, to the satisfaction of said Secretary, that all of said property had been taken or destroyed by the United States troops, the whole of this sum as then estimated by him was taken as the principal of said claim, and interest at six per cent. was also allowed by him, according to the decision of the Attorney General, from 1813 to the date of this allowance. From the amount thus allowed the previous allowances and payments were all deducted, and the balance, amounting to $39,217 50, (being only about one-fourth the sum claimed by the legal representatives of the said Col. Fisher,) was paid to them in two payments—one on the 12th October, and one on the 6th of November, 1858.

Your petitioners further state, that the legal representatives of George Fisher, deceased, upon a petition presenting the facts of their case, applied to Congress for such further relief as they should deem just. And on the 1st of June, 1860, Congress passed another joint resolution relating to the claim of George Fisher, late of Florida, deceased, of which the following is a copy, viz:

JOINT RESOLUTION relating to the claim of George Fisher, late of Florida, deceased.

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War is hereby authorized and required to revise his execution of the act of Congress entitled "An act supplemental to an act therein mentioned," approved December twenty-second, eighteen hundred and fifty-four, required of him by a joint resolution of Congress, approved June third, eighteen hundred and fifty-eight; and, on said revision, to consider and give effect to all the testimony filed in said case, including certain depositions formerly rejected by the Second Auditor of the Treasury for want of authentication, but now duly authenticated, and to restate and resettle the account heretofore stated and settled by him under said resolutions, and to make such corrections in his said former statement and settlement, and such

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further allowances, if any, on account of said claim, beyond what has heretofore been allowed and paid, as, in his opinion, justice to the claimant shall require.

Approved June 1, 1860.

Your petitioners further state that said joint resolution was passed upon the application and for the benefit of the legal representatives of George Fisher, deceased, and was duly accepted by them. And that the facts of the case were then fully before Congress, and said resolution was passed by Congress with full knowledge of the several decisions that had been made in this case, allowing interest, and also of the amount that had been allowed and paid both for principal and for interest before that time.

Your petitioners further state that under and as required by the said resolutions of June 1, 1860, the Secretary of War took upon himself the burden of revising his examination of said claim, and proceeded to restate and resettle the account theretofore stated and settled by him, and to make such corrections in his former statement and settlement, and such further allowances on account of said claim beyond what had been theretofore allowed and paid, as, in his pinion, justice to the claimants required.

Your petitioners further state that in making such revision,
23 and in resettling said claim, the Secretary of War complied with the requirements of said resolutions of June 1, 1860, in all respects, and made his decision, or award, and allowance of said claim in strict conformity therewith, and with the other acts and resolutions relating to said claim, and that said decision, award, and allowance was made upon said claim by said Secretary of War in strict conformity with said authority, given to him for that purpose, after a full and fair hearing of the parties, and after a careful examination of the case, and upon the legal and proper evidence upon which he was authorized and directed by Congress to decide; and, as advised, your petitioners claim that said award and allowance were and are final and conclusive.

Your petitioners further state that both parties duly appeared and presented their proofs and allegations on such hearing before said Secretary of War, and were fully and fairly heard by him; and that the case was finally submitted to him by both parties for his adjudication and decision. And after such hearing of and submission by both parties, and after said Secretary had fully and fairly re-examined and reviewed the whole case and evidence therein, he duly made and published his decision and award on the 23d November, 1860, of which the following is a copy, viz:

WAR DEPARTMENT, *November* 23, 1860.

In compliance with the joint resolution of June 1, 1860, entitled "A resolution relating to the claim of George Fisher, late of Florida, deceased," I have revised my execution of the act of Congress of December 22, 1854, entitled "An act supplemental to an act therein mentioned." I deem it proper to preface the present award with a brief reference to the previous action of Congress, and of the exec-

utive department in reference to the claim of George Fisher's representatives.

The first act passed in relation to this subject was that of April 12, 1848, (9 Stat., 712.) Under that act the Second Auditor, on the 22d of April, 1848, made and awarded in favor of the claimants for $8,873, being the one-half the value of the property destroyed according to his estimate. He made no allowance of interest, and he assumed, against the weight of the evidence, that one-half of the property had been destroyed by the Indians. In December, 1848, the Auditor reconsidered the case; he corrected an error of $100 in his former calculation, and allowed interest on the one-half of the value of the property from the date of the first application to Congress, until the date of the award, *i. e.*, from 1832 till 1848. By this second award the additional sum of $8,997 94 cents was allowed and paid.

In 1849, in consequence of an opinion of Mr. Toucey, then Attorney General, the Auditor again reconsidered the case, and allowed the further sum of $10,004 89, being the interest on the amount first allowed by him from the date of the destruction of the property until 1832.

All this was done under the original act of April 12, 1848. The allowances covered the one-half of the value of the property destroyed, as estimated by the Auditor, with interest from the date of its destruction until the date of the award.

On the 22d of December, 1854, Congress passed another act, (see 10 Stat., 835,) requiring the Second Auditor to re-examine the case; but, in consequence of an order from the Secretary of the Treasury, no further allowances were made, and all executive action was suspended until after the passage of the joint resolution of June 3, 1858, (see 11 Stat., p. 553,) which transferred to the Secretary of War the duties required of the Second Auditor by the act of December 22, 1854.

In pursuance of this joint resolution of June 3, 1858, I proceeded to examine the case, and estimated the value of the property belonging to Colonel Fisher, and destroyed in 1813 and 1814, at a sum only one hundred and fifty-eight dollars greater than the valuation which had been placed upon it by the Auditor. But the evidence showing that all or very nearly all the property had been destroyed by the United States troops, the whole of this sum was allowed as
24 the principal of the claim, and interest was added from the year 1813 until the date of the award. From the amount thus allowed the previous payments were deducted, and the remainder, $39,217 50, being about one-fourth of the sum then claimed by the representatives of George Fisher, deceased, was paid to them in two separate instalments in October and November, 1858.

After this had been done, and with a full knowledge of the fact, and of the previous history of the claim, Congress passed the joint resolution of June 1, 1860. It is very plain, from the language of the resolution, and from the reports of committees previously, that it was considered necessary to require a revision of the account in

detail, and that Congress regarded the estimate of the value of the property made by the Auditor, and which was substantially the same as my own, as being much less than the evidence required. It seems to be assumed by the resolution that full effect had not been given to all the testimony on file in the case. I find, on a careful examination of the depositions, substantial grounds for such an assumption. For the most part the items in the account were fairly and fully stated; but the testimony in relation to a few others, and particularly in regard to the corn crops, demands a much higher allowance than any heretofore made by the Auditor or myself. The highest calculation of the worth of these crops, based upon affidavits, as to the quantity, quality, and price, would make their value exceed thirty thousand dollars. I have concluded to allow a little more than one-half of that sum as the mean of the different estimates.

The allowance of interest on the value of the property destroyed, besides receiving the sanction of the executive departments heretofore, has also the approval of Congress. After the lapse of so many years this constitutes the chief element in the account; but to decide against it now, is simply to say that the claimants have been overpaid, and are debtors to the United States, on their own statement, to the amount of $15,191 33. I cannot bring myself to the conclusion that Congress would have required the revision of the account, with a view to further allowances, if the revision were to be made on principles which would lead to the inevitable inference that too much had been allowed already.

With these views, and with an earnest desire to execute truly the legislative will, I have revised my execution of the act of Congress of December 22, 1854, as required by the joint resolution of June 1, 1860. I have considered and given effect to all the testimony filed in the case, including the depositions formerly rejected by the Second Auditor, and have restated the account heretofore stated by me under the said resolution, making such corrections on the former statement and settlement, and such further allowances on account of said claim, beyond what has heretofore been allowed and paid, as, in my opinion, justice to the claimants requires, and which is evidently in conformity to the will of Congress.

The following is the statement of the account as thus revised and corrected:

The United States in account with the legal representatives of George Fisher, deceased.

1813.	To 550 head of cattle, at $10	$5,500 00
	To 86 head of drove hogs	1,204 00
	To 350 head stock hogs	1,750 00
	To 100 acres of corn on Bassett's creek	6,000 00
	To 8 barrels of whiskey	350 00
	To 2 barrels of brandy	280 00
	To 1 barrel of rum	70 00

	To dry goods and merchandise in store	1,100 00
	To 35 acres of wheat	$350 00
	To 2,000 hides	4,000 00
	To furs and hats in store	600 00
	To crockery ware in store	100 00
	To smiths' and carpenters' tools	250 00
	To houses burned and destroyed	600 00
	To 4 dozen bottles of wine	48 00
1814.	To 120 acres of corn on Alabama river	9,500 00
	To crops of peas, fodder, &c	3,250 00
	To interest on $22,202, from July, 1813, to November, 1860, 47 years and four months	63,053 00
	To interest on $12.750, from September, 1814, to November, 1860, 46 years and two months	35,317 50
		133,323 18

25 And the sum of one hundred and thirty-three thousand three hundred and twenty-three dollars and eighteen cents I find to be justly and equitably due to the legal representatives of George Fisher, deceased; from which amount there must be deducted the sums which have been heretofore allowed and paid by the United States, as follows:

By payment made April 22, 1848	$8,773 00
Payment made December 31, 1848	8,797 94
Payment made May 12, 1849	10,004 89
Payment made October 12, 1858	22,881 28
Payment made November 6, 1858	16,346 53
	66,803 33

Which sum of sixty-six thousand eight hundred and three dollars and thirty-three cents is to be deducted from the aforesaid sum of one hundred and thirty thousand and twenty-three dollars and eighteen cents, and the remainder, after said deduction, being the sum of sixty-six thousand five hundred and nineteen dollars and eighty-five cents, is the amount which I find to be due to the legal representatives of George Fisher, deceased, from the United States, payable out of any money in the treasury not otherwise appropriated, under the act entitled "An act for the relief of the legal representatives of George Fisher, deceased," approved April 12, 1848, and its several supplements; and which will be paid, accordingly, to the administrator of the estate of George Fisher, deceased, or to his attorney in fact.

JOHN B. FLOYD,
Secretary of War.

Your petitioners further state that the following is a statement of the account, as made by said Secretary of War, and of the deductions made for payments, &c., by him, namely:

The United States in account with the representatives of George Fisher, deceased.

July, 1863.	Claimed.	Allowed.
1. To 500 head of cattle	$5,500	$5,500
2. To 86 drove hogs, at $14	1,204	1,204
3. To 350 head stock hogs	1,750	1,750
4. To 100 acres of corn on Bassett's creek	12,500	6,000
5. To 120 acres of corn on Alabama river	15,000	9,500
6. To 8 barrels of whiskey	560	350
7. To 2 barrels of brandy	280	280
8. To one barrel of rum	70	70
9. To 10 barrels of groceries	400	....
10. To dry goods and merchandise in store	1,100	1,100
11. To 32 acres of wheat	1,050	350
12. 2,000 hides	4,000	4,000
13. To furs and hats in store	600	600
14. To crockery ware in store	100	100
15. To smiths' and carpenters' tools	350	250
16. To houses burnt and destroyed	600	600
17. To 4 dozen bottles of wine	48	48
18. To crops of peas, fodder, on Alabama river	6,500	3,250
	51,612	34,952

The whole amount of payments heretofore made on this claim is $66,803 33. As this sum is less than the interest on $34,952 from 1813 to 1848, the date of the first payment, no interest is to be calculated on the payments.

26 *The United States in account with the representatives of George Fisher, deceased.*

	Dr.	Cr.
To value of property destroyed on Bassett's creek in July, 1813	$22,202 00	
To interest on this sum to November, 1860, 47 years and 4 months	63,053 68	
To value of property destroyed on the Alabama river in September, 1814	12,750 00	
To interest on this sum from September, 1814, 46 years and 2 months	35,317 50	
CONTRA CR.		
By payments made April 22, 1848		$8,773 00
By payments made Dec. 31, 1848		8,797 94

By payments made May 12, 1849		$10,004 89
By payments made Oct. 12, 1858		22,881 28
By payments made Nov. 6, 1858		16,346 22
		66,803 33
Balance due the legal representatives of George Fisher, deceased,	$66,519 85	66,519 85
	$133,323 18	133,323 18

WAR DEPARTMENT, *December* 28, 1860.

I certify that the above is a true copy from the records of the War Department.

A. N. DRINKARD, *Chief Clerk.*

Your petitioners further state that said allowance and award was made in all respects in conformity with said acts and resolutions relating to said claim, and after deducting all payments, set-offs and allowances that had been previously made to the said legal representatives of the said George Fisher, deceased, and that said allowance and award remains wholly unpaid, and is now justly due and owing to your petitioners. And your petitioners claim and insist that by the various acts and resolutions of Congress, before stated, relating to said claim, and by the proceedings, decisions, and allowances made under the same, by the officers of the United States, authorized to act for the United States in regard to said claim, the United States have both expressly and impliedly undertaken and promised to pay said allowance and award, and are legally and justly bound to pay the same.

Your petitioners further state that said report, allowance, and award so made by said Secretary of War, on the said 23d of November, 1860, was on that day duly presented and officially filed in the Treasury Department of the United States for settlement and payment. And the said legal representatives of George Fisher, deceased, then and often since called for the payment of the said award from the Secretary of the Treasury, and frequently since that time have solicited payment thereof of said Secretary, and at the Treasury Department, but that payment of said award was then and has ever since been refused by said Secretary of the Treasury.

27 Your petitioners further state that the amount found due and allowed on said claim on the 23d of November, 1860, as aforesaid, was then justly and equitably due thereon after allowing and deducting all payments and all just credits and offsets. And that said George Fisher, deceased, and your petitioners, and each of them, and each of the other legal representatives of the said George Fisher, deceased, have at all times borne true allegiance to the government of the United States, and have not, nor has either of them, voluntarily aided, abetted or given encouragement to rebellion against the said government. And that no assignment or transfer of said claim, or of any part thereof, or of any interest therein, has ever been made by your

petitioners, and they claim to be entitled to recover the whole amount of said claim, as the legal representatives of the said George Fisher, deceased. The said Susan E. Gordon, before her marriage with the said David Gordon, was the widow of the said George Fisher, deceased, and as such, entitled to one-third part of said claim, and one-half part thereof, for a good and valuable consideration, was duly assigned to your petitioners, by the other legal representatives of the said George Fisher, deceased, before your petitioners were appointed administrator and administratrix, as aforesaid.

Your petitioners further state, that on the 28th of November, 1860, the Third Auditor of the Treasury Department wrote a letter to the administrator of George Fisher, deceased, notifying him of said allowance and award so made, as aforesaid, on the 23d of November, 1860, stating its amount, &c., and requiring him to file proof of his authority to receive the money thereon, and give a receipt therefor. And the proper evidence was furnished of the administrator's authority to receive the money and give a receipt therefor, on the part of the legal representatives of said George Fisher, deceased, and payment requested. But the Treasury Department afterwards, and ever since, have refused to pay said award, or any part thereof, to the legal representatives of George Fisher, deceased.

Your petitioners further state, that long after said award was made, and after the authority of the said Secretary of War, under the said resolution of June 1st, 1860, had been fully executed, and had ceased to exist, to wit, on the 2d of March, 1861, Congress passed a joint resolution, of which the following is a copy, viz:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That a resolution entitled "A resolution relating to the claim of George Fisher, late of Florida, deceased," passed at the first session of this Congress, and approved June one, eighteen hundred and sixty, be and the same is hereby rescinded, and the same and all proceedings under it are hereby made null and void.

Approved March 2, 1861.

Your petitioners further state, that said last mentioned resolution was passed without the knowledge or consent of the said legal representatives of George Fisher, deceased, and without notice to them, or any hearing or investigation, and was wholly an ex parte proceeding on the part of the United States; and it does not appear, by the report of any committee or otherwise, upon what ground or representation it was taken.

28 Your petitioners further state, that ever since the passage of said last mentioned resolution, it has been made the ground of objection by the Secretary of the Treasury, and the Treasury Department, against the payment of said award and allowance; and but for the passage of said last mentioned resolution, said award would have been settled and paid.

Your petitioners further state that, as advised, they claim and insist that the said repeal of the said resolution of June 1, 1860, after the authority of the Secretary of War had been fully executed, and

the award made, was and is inoperative, unauthorized, and void, and could not prejudice or affect the vested right of those interested in said award, or recall what had been done under a valid and existing law.

And as advised, they also claim that as no appeal was provided for in said resolution of June 1, 1860, the decision under it, of the said Secretary of War, was final and conclusive upon both parties in this case; and that the legal representatives of the said George Fisher, deceased, had a legal and vested right to and property in the said award then made in their favor, which no subsequent legislation could defeat or impair.

Your petitioners further state that, by reasons of said last mentioned resolution, the payment of said award has ever since been withheld and refused, and they have been compelled to appeal to this court to affirm the validity of said award, and enforce the payment thereof. And they claim, under the acts and resolutions, and in accordance with the decisions, allowances, and proceedings aforesaid, that they are justly and legally entitled to recover from the United States the amount of said award, with interest thereon from the date of said allowance until the same shall be paid, under the said decisions made in this case by the Attorney General and Secretary of War as aforesaid, and your petitioners pray this honorable court for judgment accordingly, or for such other judgment and relief in the premises as this honorable court shall deem just and proper.

DAVID GORDON,
SUSAN E. GORDON,
Administrator and administratrix of Geo. Fisher, dec'd.
HENRY BENNETT,
Claimants' Attorney.
CHARLES GIBSON,
Solicitor.
By J. D. McPHERSON,
Ass't Solicitor.

DISTRICT OF COLUMBIA,
Washington city, ss:

David Gordon, one of the above petitioners, being duly sworn, says he is a resident of Washington city, in said District; that no assignment or transfer of the claims mentioned in the foregoing amended petition, or of any part thereof, or of any interest therein, has been made except as in said amended petition stated, and that said petitioners and claimants named in said amended petition are justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that he believes the facts as stated in said amended petition are true, according to his best knowledge and information.

DAVID GORDON.

Subscribed and sworn before me this 15th day of October, 1863.
SAM'L H. HUNTINGTON,
Clerk Court of Claims.

29 In the Court of Claims.

DAVID GORDON *et al.*, administrators of GEORGE FISHER, deceased,
vs.
THE UNITED STATES.

Demurrer.

And now come the United States, by Charles Gibson, their solicitor, and say that the said petition and the matter therein contained, in manner and form as the same are above set forth, are not sufficient in law for the said claimants to have and maintain their action thereof against the United States, and that the said United States are not bound to answer the same, and this they are ready to verify. And the said United States show to this court the following causes of demurrer to the said petition:

1. That whereas the said claimants demand from the United States an amount of money alleged to have been awarded to their intestate by the Secretary of War, the petition does not set forth any express promise or undertaking by the United States to pay said amount of money, or any facts from which such a promise or undertaking is to be implied.

2. That whereas the claimants demand payment of a sum of money which they say the Secretary of War was authorized by an act of Congress to award, and did award to their intestate, the petition further shows that by a subsequent act of Congress the act under which the award had been made was repealed, and the award itself, together with all other proceedings under said act, was made null and void.

CHARLES GIBSON,
Solicitor.
By J. D. MCPHERSON,
Assistant Solicitor.

In the Court of Claims.

DAVID GORDON, administrator, and SUSAN E. GORDON, administratrix of GEORGE FISHER, deceased,
vs.
THE UNITED STATES.

Joinder in Demurrer.

And the said David Gordon, administrator, and Susan E. Gordon' administratrix, of George Fisher, deceased, come and say that the said petition and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for them to have and maintain their aforesaid action thereof against the United States, and that are ready to verify and prove the same as the court here shall direct and award. Wherefore, inasmuch as the

United States have not yet answered the said petition, nor in any manner denied the same, the said claimant prays judgment for the amount of said award, and their damages, by reason of the non-payment thereof to be adjudged to them, &c.

HENRY BENNETT,
(of New Berlin, N. Y.,) *Attorney for Claimants.*

30 And said cause having been argued and submitted on the said demurrer, on the 15th day of October, 1863, the court delivered the following opinion in said cause, on the 26th day of October, 1863, sustaining said demurrer, and therefore ordering said petition to be dismissed.

In the Court of Claims.—October 26, 1863. No. 1885.

DAVID GORDON *et al.*, &c.,
vs.
THE UNITED STATES.

PECK, Judge.

The legal representatives of George Fisher, deceased, by their amended petition, represent that during the lifetime of the said George Fisher, and in the year 1813, a large amount of his property in Florida was taken or destroyed by the troops of the United States. That before his decease, the said Fisher made application to Congress for compensation for the loss and destruction of his property. That after his decease this application was renewed by his legal representatives. That after a delay of several years, and in the year 1848, Congress passed an act for the relief of such legal representatives, authorizing and requiring the Second Auditor of the Treasury Department to examine and adjust their claims on principles of equity and justice, having due regard to the proofs for the value of the property taken or destroyed; providing that the said legal representatives should be paid for the same out of any money in the treasury not otherwise appropriated. This law also enacted, that if it should be found impracticable for the claimants to furnish distinct proof as to the specific quantity of property taken or destroyed by the troops, and by the Indians, respectively, it should be lawful for the said accounting officer to apportion the losses caused by said troops and Indians, respectively, in such manner as the proofs should show to be just and equitable, so as to afford a full and fair indemnity for all losses occasioned by the troops; but nothing was to be allowed for property destroyed by the Indians.—(See Stat. at Large, p. 712, vol. 9.)

That this act of Congress was accepted by the claimants, and that the Auditor proceeded to examine and adjust the claims under it. That the Auditor refused to receive and consider certain depositions and proofs presented by the claimants, because he did not consider them properly authenticated. That the Auditor made what the petition states to be "an award" on the 22d of April, 1848, allowing

one-half of the value of such property, as he considered the proof established had been lost or destroyed, assuming, as is alleged, that one-half of the loss and destruction was occasioned by the In-
31 dians, and not by the troops. This award amounted to $8,873, and did not, as is alleged, include interest or compensation for the losses and injuries sustained.

That in December, 1848, the Auditor (at whose instance does not appear) reconsidered the case, corrected an error in calculation of one hundred dollars in favor of the claimants in his former report, and allowed interest on the amount as corrected by him, being $8,973, from 1832, the date of the first application for relief, to the date of the allowance in 1848, which interest amounted to $8,997 94. Not yet satisfied, the complainants demanded interest from the time of the loss until the award, at the rate of interest allowed in Florida. What that rate was does not appear. This renewed controversy was submitted by the Auditor and the claimants to the Attorney General, who gave an opinion that interest at the rate of six per centum should be allowed from the date of the loss to the time of the allowance. Upon this a further allowance of interest was made by the Auditor, amounting to $10,004 89. All which allowances were granted under the original act of April 12, 1848, and were paid to the claimants as fast as the Auditor furnished his statements.

The claimants, still feeling aggrieved, renewed their application to Congress, and asked relief from the ruling of the Auditor, complaining that he had excluded certain depositions, which he deemed not properly authenticated.

Thereupon, on December 22, 1854, Congress passed a supplemental act, directing the Auditor to re-examine the case, and to allow the claimants the benefit of the depositions theretofore marked "rejected for the want of authentication," provided they were then legally authenticated, the adjustment under this supplemental act to be made in strict accordance with the previous act.

What steps, if any, were taken under this supplemental act by the Auditor, are not stated.

On the 3d of June, 1858, a joint resolution was passed, devolving upon the Secretary of War the execution of the supplemental act above referred to, directing him to proceed *de novo* to execute the act and its supplement according to their plain and obvious meaning, but to deduct from any amount which might be found justly and equitably due to the claimants all sums which had been previously paid.

The Secretary of War proceeded to examine the case, and estimated the value of the property destroyed and taken at a sum higher by $158 than the Auditor had done; but he also found that all the property had been destroyed by the troops, and none of it by the Indians. Thereupon he allowed for the entire value of the property, instead of half its value, and added interest from the date of the destruction, making the further sum of $39,217 50. This sum was also paid to the claimants.

Still dissatisfied, another petition was presented by these claimants

to Congress, and on the 1st of June, 1860, another joint resolution was passed, authorizing and requiring the Secretary of War to revise his execution of the supplemental act aforesaid, and on said re-
32 vision to give effect to all the testimony filed, including the depositions formerly rejected by the Auditor, and to restate and resettle the account, and to make such corrections in his former statement and settlement, and such further allowances, if any, as, in his opinion, justice to the claimant should require.

That the Secretary of War did revise his statement and resettle the account, and on the 23d of November, 1860, stated his conclusions in favor of the claimants, making a further allowance of $66,519 85.

The object of the petition is to obtain from this court a judgment for this further allowance of $66,519 85.

It also appears that on the 2d of March, 1861, Congress passed a joint resolution declaring the resolution of the 1st of June, 1860, under which the Secretary of War had made the last allowance, rescinded, and pronounced the same and all the proceedings under it null and void.

This repealing resolution, the petitioners aver, was passed without their knowledge or consent, or without notice to them, and that by reason of it they have not been paid; also, insisting that it is inoperative, unauthorized. and void, without power to affect the second allowance of the Secretary of War, which they insist had vested in them a right beyond the reach of Congress.

This petition was demurred to by the solicitor, upon the ground that it does not show a valid subsisting claim against the United States.

If the principle contended for by the claimants is correct, that every direction by Congress to an accounting officer, commanding him to state or restate an account, and to come to such conclusion in regard to it as, in his opinion, justice to the claimant shall require, is, in effect, a submission to the arbitrament of such officer, whose statement is to bind the government, while it may not conclude the claimant, the former becomes an unequal contestant, and that mutuality of obligation which the law implies shall always exist in matters of arbitration is wanting, and new rules will be required to conform to this new theory.

This case presents the anomaly of several different awards, which, if we recognize the principle contended for by the claimants, were each final and conclusive against the United States; but by none of which did the claimants consider themselves bound, or in any degree restrained. Should the restatements of the accounts by the Secretary of War, under the resolution of June 1, 1860, now be held obligatory, these one-sided liabilities controlling one party and not the other, if this case should become a precedent, may continue without end.

The majority of the judges believe that the various acts and resolutions of Congress in this case emanated from a desire to do justice, and to obtain the proper information as a basis of action, and were

not intended to be submissions to the arbitrament of the accounting officer. They were designed as instructions to the officer by which to adjust the accounts, Congress reserving to itself the power to approve, reject, or rescind, or to otherwise act in the premises as
33 the exigencies of the case might require. In other words, these references only required the officer to act in a ministerial, not in a judicial capacity.

While we do not deny that Congress may submit any matter of dispute to arbitration, we think it has not done so with the claims now under consideration.

We have been referred to authorities which hold that one head of a department shall not revise the allowances of his predecessor, if the discretion and judgment of that predecessor have been exercised in the making of those allowances, and no mistake or patent error exists. This rule is affirmed in the case of The United States *vs.* The Bank of Metropolis, 15 Peters, 377, but the court does not there declare that the finding of the officer is conclusive, and, if erroneous, beyond the reach of redress or revision, but says, "the judicial tribunals of the country must be resorted to, to construe the law under which the allowance was made, and to settle the rights between the United States and the party to whom the credit was given."

We are unwilling to believe that Congress intended by the resolutions under consideration to relinquish all control over the officer intrusted with the examination, or to give to his conclusion the effect of an award.

Chief Justice Marshall, *ex parte* Randolph, 2 Brockenbrough, 447, in discussing the act of 15th May, 1820, which made the finding of certain officers conclusive against others, held that such findings were merely the acts of the agents of the government, and could not have the force and effect of judicial proceedings. Speaking of these officers he says: "But these agents are purely ministerial, and their acts are necessarily to be treated only as ministerial acts."

Much stress was laid in the argument of the counsel for the claimants upon the case of Kendall *vs.* United States, 12 Peters. 524. We have examined this case, and draw these distinctions as showing the difference between it and the one under consideration.

In that case, the credit which Mr. Kendall refused to give had been allowed by his predecessor, and had, moreover, been referred to an officer of a different department from that in which the controversy arose. The contest originated out of some claim for credit in the Post Office Department, and had been referred to an officer of a different department, viz: the Solicitor of the Treasury. In the case before us, the matter was referred to the officers of the department whose appropriate duty it was to make the examination. In Kendall's case, Congress and all other branches of the government acquiesced in the finding of the Solicitor of the Treasury. Mr. Kendall, of his own motion, became the contestant. In the case before us, Congress manifested its disapprobation of the restatement by the Secretary of War, and of his conduct, in the most solemn manner, by repealing the resolution. The Secretary of the Treasury manifested his dis-

approval by refusing to pay the amount as found by the restatement of Mr. Floyd. The disapproval of the government is further manifested by its resistance of the claim here by its solicitors. The Supreme Court, in discussing that case, declined to give an
34 opinion as to the effect of a repeal by Congress of an authority like that conferred upon the Secretary of War in the petition now under consideration, remarking that "it is unnecessary to say how far Congress might have interfered by legislation after the report of the solicitor;" showing that in that state of the case no rule was to be established, leaving the question open for future consideration; and we are, at least, left in doubt as to what conclusion that court would reach in the case now before us. The point is here fairly represented, and is the controlling question in the issue raised by this demurrer. The majority of this court hold that the repealing resolution of Congress revoked the power previously conferred upon the Secretary of War, and rendered all his acts and action in the premises null and void.

It appears from the petition that the entire sum allowed by the Secretary of War, and now sought to be recovered, is composed wholly of interest, the principal debt upon which it is computed having been satisfied long since. It is not necessary, under the conclusion to which we have arrived in reference to the repealing resolution, to decide at this time how far this court would have jurisdiction to allow a claim, the entire body of which is made up of interest, prohibited, as we are, from allowing interest as the incident of a debt.

There not being any cause of action or claim set out in the petition, save what is founded upon the finding of the Secretary of War, under the resolution approved June 1, 1860, claimed to be an award, and holding, as the majority of this court does, that that resolution, and all action under it, was declared to be, and became null and void by the force and effect of the resolution of repeal of March 2, 1861, the demurrer is sustained, and the petition dismissed.

Judge Loring dissents.

Judge Wilmot, not having heard the argument, does not take part in this decision.

35 And now, to wit, 26 October, 1863, this cause came on to be heard and counsel were heard thereon; and thereupon it is ordered, adjudged, and decreed by the court here that said demurrer be sustained, and that said petition be dismissed.

By the court.

Whereupon the claimants, by Henry Bennett, esq., then counsel, filed on the 13th of November, 1863, the following notice of appeal:

36 *Notice of Appeal.*

DAVID GORDON, administrator, and SUSAN E. GORDON, administratrix, of GEORGE FISHER, deceased,
vs.
THE UNITED STATES.

GENTS: Take notice, that the said claimants (pl'ffs) in this case duly appeal to the Supreme Court of the United States from the decision and judgment rendered in this case by a majority of the Court of Claims against the said claimants, upon the ground that the joint resolution approved June 1, 1860, for the relief of said claimants, and the award that had been duly made under it in their favor on the 23d November, 1860, "became null and void, by the force and effect of the resolution of repeal, approved March 2, 1861," upon which ground the petition in this case was dismissed, and final judgment ordered against said claimant.

The said claimants hereby appeal from said decision, order and judgment, and every part thereof, and also duly appeal to said Supreme Court, from the decision and judgment pronounced against them by the said Court of Claims, upon the demurrer to their petition in this case.

Yours, &c.,
HENRY BENNETT,
Claimants' Att'y.

To CHARLES GIBSON, Esq.,
Solicitor for the U. S. and to the
Clerk of the Court of Claims.

November 10, 1863.

37 UNITED STATES OF AMERICA, *ss:*

I, James C. Welling, assistant clerk of the Court of Claims, do certify that the within and foregoing contains a true copy of the record in the case of David Gordon, administrator, and Susan E. Gordon, administratrix, of George Fisher, deceased, against the United States, so full and entire as the same remains of record in the office of said clerk.

In testimony whereof, I have hereunto set my hand and affixed the [SEAL.] seal of said court, at the city of Washington, this 25th day of November, A. D. 1863.

JAMES C. WELLING, *Ass't Cl'k.*

Attest:

JOS. CASEY,
Chief Justice Court of Claims.

Filed 2d December, 1863

[REC. CCXCIII, D. T. 1863.]